150 US 90

RECORD, CASE No. 13,868.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~254~~. 39

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, PLAINTIFF IN ERROR,

vs.

NEIL R. BOLLONG.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Schuyler National Bank of Schuyler, Nebraska, plaintiff in error, and Neil R. Bollong, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause

2 of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
SAM. F. MILLER,
Justice Sup. Court U. S.

3 The United States of America to Neil R. Bollong, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on

the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska, wherein The Schuyler National Bank of Schuyler, Nebraska, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

SAM. F. MILLER,
Justice Sup. Court U. S.

4 On this 20th day of August, in the year of our Lord one thousand eight hundred and eighty-nine, personally appeared before me the subscriber, E. T. Hodsdon, and makes oath that he delivered a true copy of the within citation to the within-named defendant in error, Neil R. Bollong, at Schuyler, in Colfax county, Nebraska, on the 20th day of August, A. D. 1889; and further deponent saith not.

E. T. HODSDON.

Sworn to and subscribed the 20th day of August, A. D. 1889.

[Notarial Seal, Miles Zentmyer, Colfax County, Nebraska.]

MILES ZENTMYER,
Notary Public.

5 To the Honorable Samuel F. Miller, justice of the Supreme Court of the United States:

Your petitioner, The Schuyler National Bank of Schuyler, Nebraska, respectfully shows to your honor:

First. A final judgment was rendered in the supreme court of the State of Nebraska, being the highest court of the State in which a decision in the suit could be had, on the 20th day of March, A. D. 1889, in a suit wherein The Schuyler National Bank of Schuyler, Nebraska, was defendant in error and Neil R. Bollong was plaintiff in error, in the sum of $236.00 and costs.

Second. This action was commenced in the district court of Colfax county, Nebraska, by Neil R. Bollong against your petitioner, The Schuyler National Bank of Schuyler, Nebraska, under sections 5197 and 5198 of the Revised Statutes of the United States, to recover double the amount of usurious and illegal interest alleged to have been charged and received by the said Schuyler National Bank of Schuyler, Nebraska, to and from the said Neil R. Bollong, and, a jury being waived, the cause was heard by the court, and on the 11th day of June, A. D. 1888, the court made a finding of fact to the effect that certain loans were usurious; that on those usurious loans the said bank had received $118.00, and that

the said plaintiff was entitled to recover in double the amount of interest actually paid.

The defendant bank filed exceptions and also a motion for a new trial, on the ground that under the statute the plaintiff could recover only double the usurious interest, whereas the court found that the defendant must pay double the whole interest
6 instead of double the usurious interest, and that the same was contrary to law.

The defendant also objected to the jurisdiction of the court to try and determine the subject-matter of this action.

On the — day of August, A. D. 1888, proceedings in error were commenced in the supreme court of the State of Nebraska to reverse said judgment.

Subsequently this cause came on for argument and final hearing in the supreme court of the State of Nebraska, and thereupon, after due consideration of the several assignment- of errors, the court overruled the same and affirmed the judgment, as will appear from the opinion of the court attached to the record here presented, with this application, for the inspection of the court.

Wherefore your petitioner prays for the allowance of a writ of error by the Supreme Court of the United States and such other process as will enable the petitioner to obtain a review of the case and a correction of the errors alleged.

THE SCHUYLER NATIONAL BANK
OF SCHUYLER, NEBRASKA.
By —— ——.

I allow this writ of error.
April 29, 1889.

SAM. F. MILLER,
Justice Sup. Court U. S.

7 Pleas before the supreme court of the State of Nebraska at a term whereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 1st day of January, A. D. 1889.

Present: Hon. M. B. Reese, chief justice; Hon. Amasa Cobb, Hon. Samuel Maxwell, judges.

Attest: GUY A. BROWN.

Be it remembered that on the 4th day of August, 1888, there was filed in the office of the clerk of said court a certain petition in error in the words and figures following, to wit:

Petition in Error.

8 In the Supreme Court of Nebraska.

NEIL R. BOLLONG, Plaintiff,
v.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, Defendant. } Petition in Error.

The plaintiff complains of the defendant for that on the 11th day of June, 1888, the plaintiff herein recovered a judgment against the defendant herein in the district court of Colfax county for the sum of $236.00 and costs of suit in an action pending in said court, wherein the plaintiffs herein was plaintiff and the defendant herein was defendant. A transcript of the proceedings containing said final judgment is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment in this:

First. That there was error in the findings of the court against the plaintiff on the "fifth," "sixth," "seventh," "eighth," "tenth," "eleventh," and "twelfth" causes of action set out in the petition.

Second. That said findings and the decision and judgment of the court thereon against the plaintiff are not sustained by sufficient evidence.

Third. That said findings and the decision and judgment of the court against the plaintiff on the said 5th, 6th, 7th, 8th, 10th,
9 11th, and 12th causes of action set out in his petition are contrary to law.

Fourth. The court erred in overruling the motion for a new trial.

The plaintiff therefore prays that the findings, conclusions, and judgment of said district court upon the fifth, sixth, seventh, eighth, tenth, eleventh, & twelfth causes of action as set forth in plaintiff's petition may be reversed; that judgment may be rendered in this court in favor of the plaintiff upon said fifth, sixth, seventh, eighth, tenth, eleventh, & twelfth causes of action, and that the judgment rendered by the said district court for the sum of $236 may be corrected in accordance with the judgment of this court, and for such other relief as justice may require.

C. J. PHELPS AND
J. A. GRIMISON,
Attorneys for Plaintiff.

(Endorsed:) 3276. In supreme court of Nebraska. Neil R. Bollong *v.* Schuyler National Bank, Schuyler, Neb. Petition in error. Supreme court of Nebraska. Filed Aug. 4, 1888. Guy A. Brown, clerk. C. J. Phelps & J. A. Grimison, att'ys for plaintiff in error.

And on the same day, to wit, on the 4th day of August, 1888, there was filed in the office of the clerk of said court a certain transcript in the words and figures following, to wit:

Transcript.

10 THE STATE OF NEBRASKA, } ss:
Colfax County, }

Pleas before the district court of Colfax county, Nebraska, at a term begun and holden in the county of Colfax on the 7 day of February, 1888, before —— – —, judge of said district court.

NEIL R. BOLLONG
v.
SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA.

Be it remembered that heretofore, to wit, on the 19th day of September, A. D. 1887, an amended petition was filed in the office of the clerk of the district court of Colfax county in the words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

NEIL R. BOLLONG, Plaintiff,
v.
SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, Defendant. } Amended Petition.

The plaintiff says—

That the defendant, The Schuyler National Bank of Schuyler, Nebraska, is a corporation organized and doing business, under and by virtue of the laws of the United States relating to national banks, at Schuyler, in said Colfax county, as a banking association,
10½ and that said defendant was so organized and doing business during the happening of all and each of the events and facts hereinafter complained of.

First. And for a first cause of action the plaintiff, complaining of the defendant, says that on or about the 25th day of November, 1885, the plaintiff borrowed of and from the defendant the sum of $800 and executed his certain promissory note of that date therefor, due six months after the date thereof, and on the same day he paid to the defendant and the defendant knowingly contracted for and received from the plaintiff the sum of $73.20 as and for interest on said sum of $800 for the term and time of six months in advance; that said payment of interest so as aforesaid paid by plaintiff to defendant and by defendant knowingly contracted for and received from the plaintiff was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt and usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $146.40, no part of which has been paid.

Second. And for a second cause of action the plaintiff, complaining of the defendant, says that on or about the 28th day of May, 1886, plaintiff executed and delivered to the defendant a new note for said sum of $800, and on the same day paid to the defendant and defendant knowingly contracted for and received from the
11 plaintiff the sum of $37.20 as and for interest on said sum of $800 for the term and time of ninety days in advance; that said payment of interest so as aforesaid paid by plaintiff to defendant and by defendant knowingly contracted for and received from the plaintiff was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt and usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statutes of the United States the defendant became and is indebted to the plaintiff in the sum of $74.40, no part of which has been paid.

Third. And for a third cause of action the plaintiff, complaining of the defendant, says that on or about the 17th day of September, 1886, plaintiff executed and delivered to the defendant a new note for said sum of $800, and on the same day paid to defendant and defendant knowingly contracted for and received from plaintiff the sum of $80.80 as and for interest on said sum of $800 from August 29, 1886, to March 17th, 1887; that said payment of interest so as aforesaid made by plaintiff to defendant and by defendant knowingly contracted for and received from the plaintiff was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of
12 this action, and by a violation of said statutes of the United States the defendant became and is indebted to the plaintiff in the sum of $161.60, no part of which has been paid.

Fourth. And for a fourth cause of action the plaintiff, complaining of the defendant, says that on or about the 16 day of June, 1885, he borrowed of and from the defendant the sum of $2.000 and executed his certain promissory note of that date therefor, due ninety days thereafter, and on the same day he paid to the defendant and defendant knowingly contracted for and received from the plaintiff the sum of $62.00 as and for interest on said sum of $2,000 for the term and time of ninety days in advance; that said payment of interest so as aforesaid made by plaintiff to the defendant and by defendant knowingly contracted for and received from the plaintiff was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 12 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $124, no part of which has been paid.

Fifth. And for a fifth cause of action the plaintiff, complaining

of the defendant, says that on — about the 17 day of September, 1885, he executed and delivered to the defendant a new note for said sum of $2,000, and on the same day paid to the defendant and the said defendant knowingly contracted for and received from the plaintiff the sum of $62.00 as and for interest on said
13 sum of $2,000 for the term and time of ninety days in advance; that said payment of interest so as aforesaid made by plaintiff to defendant and by the defendant knowingly contracted for and received from the plaintiff was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 12 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of the said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $124, no part of which has been paid.

Sixth. And for a sixth cause of action the plaintiff, complaining of the defendant, says that on or about the 19th day of December, 1885, he executed and delivered to defendant a new note for said sum of $2,000, and on the same day paid to defendant and defendant knowingly contracted for and received from the plaintiff the sum of $94.00 as and for interest on said sum of $2,000 for the term and time of ninety days in advance; that said payment of interest so as aforesaid made by plaintiff to the defendant and by defendant knowingly contracted for and received from plaintiff was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of *of* the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States the defendant became and is indebted to
14 the plaintiff in the sum of $188, no part of which has been paid.

Seventh. And for a seventh cause of action the plaintiff, complaining of the defendant, says that on or about the 22nd of March, 1886, he executed and delivered to defendant a new note for said sum of $2,000, and on the same day paid to the defendant and the defendant knowingly contracted for and received from the plaintiff the sum of $62 as and for interest on said sum of $2,000 for the term and time of sixty days in advance; that said payment of interest so as aforesaid made by plaintiff to the defendant and by defendant knowingly contracted for and received from plaintiff was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $124, no part of which has been paid.

Eighth. The plaintiff, complaining of the defendant, says for an eighth cause of action that on or about the 24 day of May, 1886,

he executed and delivered to defendant a new note for said sum of $2,000 and on the same day paid to defendant and defendant knowingly contracted for and received from plaintiff the sum of $31.50 as and for interest on said sum of $2,000 for the term and time of thirty days in advance; that said payment of interest so as aforesaid paid by plaintiff to defendant and by defendant knowingly contracted for and received from plaintiff was at a greater
15 rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States the defendant became indebted to the plaintiff in the sum of $63, no part of which has been paid.

Ninth. And for a ninth cause of action the plaintiff, complaining of the defendant, says that on or about the 18th day of July, 1885, he borrowed from the defendant the sum of $1,200 for ninety — and executed his certain promissory note of that date therefor, due ninety days thereafter, and on the same day he paid to defendant and defendant knowingly contracted for and received from the plaintiff the sum of $55.80 as and for interest on said sum of $1,200 for the term and time of ninety days in advance; that said payment so as aforesaid made by plaintiff to defendant and by defendant knowingly contracted for and received from the plaintiff was at a greater rate of interest then is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by violation of said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $111.60, no part of which has been paid.

Tenth. And for a tenth cause of action the plaintiff, com-
16 plaining of the defendant, says that on or about the 19th day of October, 1885, he executed and delivered to defendant a new note for said sum of $1,200, and on the same day he *he* paid to defendant the sum of $55.00 as and for interest on said sum of $1,200 for the term and time of ninety days in advance; that said payment so as aforesaid paid by plaintiff to defendant and by defendant knowingly contracted for and received from plaintiff was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States defendant became indebted and is indebted to the plaintiff in the sum of $110, no part of which has been paid.

Eleventh. And for an eleventh cause of action the plaintiff, complaining of the defendant, says that on or about the 20th day of January, 1886, he executed and delivered to defendant a new note for said sum of $1,200, and on the same day paid to defendant and

defendant knowingly contracted for and received from plaintiff the sum of $73.80 as and for interest upon said sum of $1,200 for the term and time of four months in advance; that said payment so as aforesaid made by plaintiff to defendant and by defendant knowingly contracted for and received from plaintiff was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the
17 commencement of this action, and by violation of said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $147.60, no part of which has been paid.

Twelfth. And for a twelfth cause of action the plaintiff, complaining of the defendant, says that on or about the 22nd day of May, 1886, he executed and delivered to the defendant a new note for said sum of $1,200, and on the same day paid to the defendant and defendant knowingly contracted for and received from plaintiff the sum of $19.80 as and for interest upon said sum of $1,200 for the term and time of ninety days in advance; that said payment of interest so as aforesaid made by plaintiff to defendant and by defendant knowingly contracted for and received from plaintiff was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by violation of said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $39.60, no part of which has been paid.

That the several sums of money so as aforesaid unlawfully paid by the plaintiff to the defendant as interest and by the defendant knowingly and unlawfully contracted for and received from the plaintiff amount in the aggregate to the sum of $707.10, whereby and by virtue of defendant's violation of section 5198 of the Revised Statutes of the United States defendant became and is indebted
18 to the plaintiff in the sum of $1,414.20, for which plaintiff demands judgment and for his costs expended herein.

(Signed) J. A. GRIMISON AND
C. J. PHELPS,
Att'ys for Plaintiff.

STATE OF NEBRASKA, } ss:
Colfax County, }

Neil R. Bollong, being first duly sworn, says that he is the plaintiff mentioned in the foregoing petition; that he has heard it read and knows the contents thereof, and that the facts therein stated are true, as he verily believes.

(Signed) NEIL R. BOLLONG.

Subscribed in my presence and sworn to before me this 19th day of September, 1887.

(Signed) T. W. WHITMAN,
Clerk District Court, Colfax County, Nebraska,
[SEAL.] By ALLEN CAMERON, *Deputy.*

And afterwards, on the 15th day of November, 1887, there was filed in the office of said clerk an answer in the words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

NEIL R. BOLLONG, Plaintiff,
v.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, Defendant.
} Answer.

19 The defendant above named, for answer to the petition of the plaintiff herein, alleges—

First. That the fourth and ninth causes of action stated in the plaintiff's petition did not accrue within two years next before the commencement of this action.

Second. That as to the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action the plaintiff ought not to be admitted to say that at the times alleged in the last said causes of action he paid to the defendant the said several sums of money stated in the last aforesaid causes of action as and for interest on the sums therein named respectively and for the respective periods of time therein mentioned being at a greater rate than is allowed by the laws of the State of Nebraska, because the plaintiff, in two actions commenced in the district court of said Colfax county by the defendant herein against the plaintiff herein upon the notes which evidenced the indebtedness upon which the said several sums of money stated in the last aforesaid causes of action were paid as interest, set up and pleaded in his answers in said actions in defense to said indebtedness the same identical matters and causes of actions mentioned in the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth paragraphs in the petition herein; that to such answers the defendant pleaded the general issue upon which issue was joined. Said issue was tried to the court; said court found for the defendant therein, the plaintiff herein, upon said issue and judgments were thereupon
20 given upon the merits in accordance with said findings; that the said causes of action last mentioned were necessarily and in fact considered and adjudicated in the decisions of the causes so brought and described in said court and in the rendition of said judgments; which said judgments are final and still in full force and have not been reversed, vacated, or modified.

Third. That it denies each and every allegation in said petition contained.

(Signed) E. T. HODSDON,
Attorney for the Defendant.

THE STATE OF NEBRASKA, } ss:
Colfax County, }

E. T. Hodsdon, being first duly sworn, on oath deposes and says that he is the duly authorized attorney for the defendant in the above-entitled action; that the plaintiff is a corporation, and the facts stated in the foregoing answer are true as he verily believes.

(Signed) E. T. HODSDON.

Subscribed in my presence and sworn to before me this 15th day of October, A. D. 1887.

(Signed) M. T. BOHMAN,
Justice of the Peace.

And afterwards, on the 14th day of February, 1888, the plaintiff filed his reply in the words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

21 NEIL R. BOLLONG, Plaintiff,
vs.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA. } Reply.

And now comes the plaintiff, and for reply to the answer of the defendant says that he denies each and every allegation of new matter contained in said answer.

(Signed) NEIL R. BOLLONG,
By J. A. GRIMISON AND
C. J. PHELPS, *His Att'ys.*

Trial Had.

And thereafter, on the 11th day of June, 1888, the court filed its findings herein in the words and figures following, to wit:

In the District — of Colfax County, Nebraska.

NEIL R. BOLLONG
vs.
SCHUYLER NATIONAL BANK.

The court finds for the plaintiff in the sum of $236.00.

(Signed) WILLIAM MARSHALL, *Judge.*

In this case judgment should be entered for the plaintiff for $236.00, the same being the amount of usurious interest paid by the plaintiff, as set out in his 2nd and 3rd causes of action. Upon the other causes of action the finding is for the defendant. Cost should be taxed to the defendant.

(Signed) WILLIAM MARSHALL, *Judge.*

22 Now comes the plaintiff and excepts to the findings, decision, and judgment of the court against him on the fifth, sixth, seventh, eighth, tenth, eleventh, and twelfth causes of action as set forth in this petition.

And afterwards, on the 12th day of June, 1888, plaintiff filed his motion for a new trial in the words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

NEIL R. BOLLONG
vs.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEB. } Motion for New Trial.

The plaintiff moves the court for a new trial for the following reasons:

First. There was error in the findings of the court against the plaintiff on the fifth, sixth, seventh, eighth, tenth, eleventh, and twelfth causes of action set out in his petition.

Second. That said findings and decision and judgment of the court thereon against the plaintiff are not sustained by sufficient evidence.

Third. That said findings and the decision and judgment of the court against the plaintiff on the said 5th, 6th, 7th, 8th, 10th, 11th, and 12th causes of action set out in his petition are contrary to law.

(Signed) C. J. PHELPS AND
J. A. GRIMISON,
Att'ys for Plaintiff.

23 And afterwards, to wit, on the 14th day of June, 1888, it being the fourth day of June, A. D. 1888, term of this court, this cause came on for hearing on the motion of the plaintiff for a new trial, filed June 12, 1888, and on the motion of the defendant for a new trial, filed June 14, 1888, and, after hearing the argument of counsel and being fully advised in the premises, the said motions and each of them are overruled; to which ruling and holding of the court the plaintiff then and there excepted, and to which ruling and holding of the court the defendant then and there excepted.

Both plaintiff and defendant are allowed 40 days in which to prepare and submit bills of exceptions.

And on the same day, to wit, on the 4th day of August, 1888, there was filed in the office of the clerk of said court a certain bill of exceptions in the words and figures following, to wit:

Bill of Exceptions.

24 In the District Court of Colfax County, Nebraska.

N. R. BOLLONG
vs.
THE SCHUYLER NATIONAL BANK.

Bill of Exceptions.

Be it remembered that on the trial of this cause in the district court of Colfax county, before William Marshall, judge of said court, at the February terms thereof, to wit, on the 17th day of February, 1888, the following evidence and testimony was introduced and given to the court and jury by the plaintiff and in his behalf and by the defendant and in its behalf, together with the objections of the said parties to the introduction thereof, the rulings of the court thereon, and the exceptions of the said parties thereto by them respectively noted, as hereinafter set forth:

Present: The said plaintiff, with his attorneys, C. J. Phelps and J. A. Grimison, and also the defendant, by its attorney, E. T. Hodsdon.

The plaintiff, N. R. BOLLONG, to maintain the issues on his part, took the stand as a witness, and, being duly sworn as required by law, testified as follows:

(PHELPS:)

1. Mr. Bollong, are you the plaintiff in this case?

A. Yes, sir.

2. I wish to call your attention to the first cause of action set up in your petition against the defendant, and ask you what transaction you had with the defendant on the 25th day of November, 1885, with reference to borrowing $800, if any.

3. (HODSDON:) In the first place I want to raise the objection, general objection, to the reception of any evidence under the amended petition in this case, and for grounds of objection say
25 that it does not state facts sufficient to constitute a cause of action.

Objection overruled. Defendant excepted.

A. I borrowed $800 at that time.

Defendant further objects to this question as incompetent and immaterial and that the matter set out here in this first cause of action are already sued for. Objection overruled. Defendant excepted.

A. I borrowed $800 at that time.

It is agreed by the parties that the evidence in the case may be taken now, and the questions of law governing the facts proved shall be settled hereafter, subject to any objections and exceptions either

party may desire to make hereafter, either to evidence or rulings upon questions of law.

(Answer continued.) And there was deducted $73.20 at the time. This was for six months—this $73.20 deducted amount; 18% interest.

4. What was that deducted as—reserved by the bank for?

A. Interest.

5. For what length of time?

A. Six months.

6. Six months in advance?

A. Yes, sir.

7. Now, I will call your attention to the second cause of action and ask you what transaction, if any, you had with reference to the renewal of that note on or about the 28th day of May, 1886.

A. Why, it was renewed about the 28th day of May, and at
26 that time I paid $37.20 in advance for three months' interest.

8. At what rate per annum was that?

A. 18 %.

9. Now, I will call your attention to the third cause of action set out in your petition and ask you what transaction, if any, you had with the defendant on or about the 17th day of September, 1886, with reference to a renewal note given for that $800.

A. I renewed it again about the 17th of September, and paid $80.80 interest.

10. What was that $80.80 paid for, in time, and when?

A. It was 18 % for six months and a half interest.

11. How much on that was in advance?

A. Why, six months.

12. In advance?

A. Yes, sir.

13. And 18 % for half a month past due on the note?

A. Yes, sir.

14. Now, those transactions of borrowing and renewing with the defendant, what officer or officers of the bank did you have those transactions with?

A. Sometimes with the cashier and sometimes with the president.

15. Who is the cashier?

A. William H. Sumner.

16. Who was the president?

A. Charles was president—Charles Sumner.

17. Now, I will call your attention to the fourth cause of action set out in your petition and ask you what transaction, if any,
27 you had with the defendant on or about the 16th day of June, 1885, with reference to borrowing the sum of $2,000 from defendant.

A. I borrowed $2,000 the 16th of June, 1885, and there was deducted on it $62, interest for three months, 12 %.

18. Deducted and retained by the bank?

A. Yes, sir.

19. Reserved and retained by the bank?

A. Yes, sir.

20. Now, I will call your attention to the fifth cause of action in your petition and ask you to state what transaction, if any, you had with the defendant on or about the 17th day of September, 1885, with reference to giving a renewal note for said sum.

Defendant objected as leading. Objection sustained.

21. Now, I will call your attention to the fifth cause of action set out in your petition and ask you what transaction, if any, you had with the defendant on or about the 17th day of September, 1885.

A. I renewed the $2,000 for ninety days and paid $62 interest in advance.

22. For what length of time and at what rate?

A. 12 %.

23. For what length of time?

A. Ninety days.

24. Now, I will call your attention to the sixth cause of action set out in your petition and ask you to state what transaction, if any, you had with the defendant on or about the 19th day of December, 1885.

Defendant objected as leading. Objection overruled.

28 A. The 19th of December I renewed this $2,000 for ninety days and paid $94 interest in advance, at 18 %, the first time.

25. For what length of time?

A. Ninety days.

26. Now, I will call your attention to the seventh cause of action set out in the petition and ask you to state what transaction, if any, you had with the defendant on or about the 22nd of March, 1886.

A. The $2,000 was again renewed for sixty days and I paid $62 interest in advance, which was 18 %.

27. I call your attention to the eighth cause of action set out in your petition and ask you to state what transaction, if any, you had with the defendant on or about the 24th day of May, 1886.

A. Why, it was again renewed for thirty days.

28. What was renewed?

A. This $2,000, and I paid in advance $31.50.

29. For what time and at what rate?

A. For thirty days; it was 18 %.

30. I will call your attention to the ninth cause of action set out in your petition and ask you to state what transaction, if any, you had with the defendants on or about the 18th day of July, 1885, with reference to the borrowing of $1,200 for ninety days.

A. About the 18th of July, 1885, I borrowed $1,200.

31. What did you do at that time and what was done by the defendants?

A. Why, it was for ninety days and there was deducted $55.80 for interest.

32. What was done besides deducting the $55.80, if anything, by the bank?

A. It was reserved by the bank for interest in advance for ninety days.

33. At what rate?

A. 18 %.

34. I will call your attention to the tenth cause of action set out in your petition and ask you to state what transaction, if any, you had with the defendant on or about the 19th day of October, 1885.

A. I renewed it the 19th day of October, 1885, for ninety days.

35. Renewed what?

A. This $1,200, and paid $55 in advance.

36. Who did you pay it to?

A. To the Schuyler National bank.

37. What was that $55 for?

A. For interest on this $1,200; ninety days.

38. At what rate?

A. 18 %.

39. I will call your attention to the eleventh cause of action set out in your petition and ask you to state what transaction, if any, you had with the defendany on or about the 20th day of January, 1886.

A. I renewed this $1,200 the 20th of January for four months and paid $73.80 interest in advance to the Schuyler National bank; that was 18 % interest.

40. What length of time?

A. Four months.

41. I will call your attention to the twelfth cause of action set out in your petition and ask you to state what transaction, if any, you had with the defendant on or about the 22nd day of May, 1886.

A. I renewed this 1,200 about May 22nd, 1886, for thirty days and paid $19.80 interest in advance, which would be 18 % interest.

(PHELPS:)

42. Now, do you agree that the defendant is a national bank incorporated under the laws of Congress to regulate and govern national banks?

(HODSDON:)

43. Yes, sir.

It is agreed by the defendant that the defendant, Schuyler National Bank, is a national bank incorporated under the laws of Congress governing the organization of national banks, and that this defendant is doing business at Schuyler, Nebraska, within the county of Colfax and State of Nebraska.

Cross-examination.

(HODSDON:)

44. Mr. Bollong, this $800 note, or rather the transaction that you had with the Schuyler National bank on the 25th day of Novem-

ber, 1885, about which you testified in your direct examination—what did you say about this $73.20?

A. I stated it was deducted and reserved by the bank.

45. Tell how the transaction was had; tell what was done.

A. I borrowed $800 from them and this was reserved out.

46. Tell everything that was done; whether it was reserved as usury; I want to find out whether it was or not.

A. Well, that is all there was of it.

47. What did you do in there when you went there; what did you do in there on that day?

A. I borrowed this $800.

31 48. What did you do? State the transaction; state every act that you did in connection with the transaction.

A. Well, I have stated.

49. You have just stated you borrowed the money. Now state what you did when you got into the bank—what you did.

A. Oh, I don't remember every word was said and done.

50. That is what we want to get at; it is very essential.

A. I went there and borrowed this $800, or asked them to borrow this money, and they let me have it, with coventry on the note.

51. What else?

A. Well, they let me have it.

52. Well, what was done?

A. Well, I gave them the note for $800 and they kept the interest out, as stated before.

53. Kept it out how?

A. Why, reserved it; reserved the interest.

54. What is reserving the interest? What do you mean?

A. The interest was deducted out of the $800. I gave a note for $800, but only received $726 and a little over.

55. Where was that money delivered to you?

A. How is that?

56. Where was that money delivered to you?

A. Why, at the bank; Schuyler National bank.

57. Now, has that note been paid?

A. No, sir; it has not.

58. But the note you gave on November 25th, 1885, is still

32 outstanding?

A. Yes, sir.

57. Who has it?

A. I don't know; I suppose the bank had it the last time.

(HODSDON:)

60. On November 25th, 1885, when he borrowed that $800, I asked him if that note had been paid.

(WITNESS:) That note—why, it was renewed.

61. I ask you if that note had been paid.

(PHELPS:)

62. He said it had been renewed.

(PHELPS:)

63. I will ask you if it has been paid.

A. Why, I renewed it.

(HODSDON:)

64. Answer the question; you can answer that question by yes or no.

Plaintiff objected to the renewal of this question; he has answered; he said that note was renewed. Objection overruled.

65. Has that note been paid?

Plaintiff objected. Objection sustained.

66. Well, Mr. Bollong, you say, then, that note has not been paid?

Plaintiff objected on the ground that it has been gone over before.

(COURT:) It may be preliminary.

Objection overruled.

67. I understand you, then, to say that that note has not been paid?

Plaintiff objected. Objection sustained.

68. Well, Mr. Bollong, when did that note mature that you gave on the 25th day of November, 1885?

A. Why, in six months.

69. What became of that note that was given on the 25th
33 day of November, 1885?

A. I took it up and gave a new note.

70. When was that note surrendered to you?

A. Oh, in the latter part of May.

71. When?

A. Well, from the 28th of May to the first of June; somewhere between those dates.

72. Then that note was given on the 25th day of May, 1885, when it became due; was it surrendered and delivered up to you, was it, by the holder?

A. When it was renewed?

73. Was it surrender-d and delivered up to you?

A. Yes, sir.

74. What became of that note? What did you do on the 28th day of May, 1886, with reference to having a transaction with the Schuyler National bank?

A. May?

75. Yes, sir.

A. I renewed this note.

76. What note?

A. This $800 note.

77. What do you mean by renewing it?

A. I took up the old note and gave a new one.

78. Well, what was that new note, for how much? And tell us about it; tell us about the transaction; state the facts fully.

34 A. I gave a new note for $800 for ninety days at that time and paid $37.20 interest.

79. Was anything else done then?

A. No; not that I remember of.

80. Let me see those notes. Now, on the 28th day of May you made and delivered a new note, did you?

A. Yes, sir.

81. What security was there; the same as before?

A. The same as before.

82. When you made and delivered that note, the other note, what was done with that old note?

A. There it is, right there.

83. The note you had given six months previous to that time; what was done with it?

A. At that time?

84. At the time you came there in May; what was done about that note you had given in November?

A. I took it home with me.

85. How did you get it?

A. Why, by giving the new note.

86. They surrender- the old note?

A. Yes, sir.

87. Delivered it up to you?

A. Yes, sir.

88. Was that old note, that note you gave in November, cancelled? State whether that note given in November was cancelled, stamped, "paid."

35 Plaintiff objected as improper cross-examination and not the best evidence. Objection sustained.

89. Mr. Bollong, I will ask you whether that note that was surrendered to you on the 28th day of May or thereabouts by the Schuyler National bank, which you gave on the 25th day of November, was cancelled.

Plaintiff objected as improper cross-examination, immaterial, not the best evidence, and I will ask you to be kind enough to give the witness his memorandum. Objection overruled.

A. It was cancelled. I had not the interest at that time, but soon as I had the interest it was cancelled. This may have been three or four days.

90. And when the note was cancelled it was then delivered back to you, was it not?

A. Yes, sir.

91. Now, when this note that you gave on the 28th day of May became due what was done about that?

A. On the 28th day of May?

92. You gave a note on the 28th day or thereabouts, didn't you?
A. Yes, sir.
93. Well, what was done about that?
A. Well, I have just told you; that is what we have been ta-king about.
94. No; it was the other. We was talking about the first one. When it became due what did you do about it?
A. I renewed it for ninety days.
95. Well, tell what was done; tell everything that was
36 done in connection with the renewal.
A. Well, I renewed it and paid the interest—renewed it for ninety days and paid the interest.
96. What steps did you *do* to make a renewal of it?
A. I had it—had the note signed the same as the old, and had it renewed.
97. You had a new note executed, did you not?
A. Yes, sir.
98. What was done with this note, then, when it was matured? This is the note, isn't it?
A. Yes, sir.
99. Well, what was done?
A. Why, this is the $800.00 note.
100. When this was due what did you do?
A. This is the 28th?
101. Yes, sir.
A. Why, I renewed it the 17th of September, 1886.
102. You renewed it by executing a new note?
A. Yes, sir.
103. With the same surety?
A. Yes, sir.
104. And when you had done so what was done with this note—what was done with it—this note here that became due on the 29th day of August?
A. Why, it was given back to me.
105. In the condition it now is?

Plaintiff objected as incompetent and immaterial and improper cross-examination. Objection overruled.

37 A. Why, yes, sir.
106. Was the note cancelled before being delivered to you? Was the note given back to you?
A. Yes, sir; it was given back to me.
107. Was it cancelled?
A. Yes, sir.
108. When the new note was given?
A. Yes, sir.
109. Now, at that time—that was the 17th of September?
A. Yes, sir.
110. What did you do with that that day?
A. I gave a new note.
111. For how much?

A. For $800.

112. And where is that note?

A. Why, you had it yesterday.

113. That note has not been paid?

A. No, sir.

114. That is the note upon which suit has been brought?

A. Yes, sir.

(PHELPS:)

115. That is Horace Muzzy's note.

116. I want to call your attention to a transaction you had with the defendant, Schuyler National Bank, on the 16th day of June, 1885. Mr. Bollong, calling your attention to this transaction, you say that you borrowed on that date $2,000 of the Schuyler National bank?

A. Yes, sir.

117. Well, go on and describe that transaction fully; tell everything that was said and done between yourself and the officer
38 of the bank with whom you transacted the business.

A. I borrowed $2,000 about that time for ninety days and paid the interest—the interest was reserved—the same as the other note, $800.

118. Now you are getting at some conclusions. I want you to tell what you said and did there—that was what my question called for—when you went there to negotiate that loan.

A. I went there and made arrangements to borrow $2,000, and they let me have it.

120. Well, what else was done?

A. Well, we fixed it up, and, I guess, that amount was placed to my credit, with the exception of the interest that was kept out.

121. You guess it was. Do you know?

A. That was put to my credit.

122. Do you know how much was put to your credit?

A. About 1,140-odd dollars—44 dollars.

123. Eleven hundred and forty-odd dollars placed to your credit on the 16th of June, 1885?

A. Somewhere about $1,144.

124. You are mistaken about that, ain't you?

(PHELPS:) No; he ain't.

125. On the 16th day of June, 1885—well, didn't you testify in your direct examination that there was $62 reserved?

A. Yes, sir.

126. And you borrowed $2,000. You don't mean to be understood that, do you?

A. Yes, sir. I borrowed $2,000; it was at least $1,938—interest of-.

127. That was placed to your credit?

39 A. Yes, sir.

128. Was there any money counted out to you?

A. I don't remember whether there was or not; sometimes there was, but most of the times it was just placed to my credit.

129. This particular time was any money counted out to you over the counter?

A. I don't remember whether there was or not.

130. You can't remember whether there was or not?

A. I don't remember.

131. If there was you are not positive, then, of the fact. Was that all there was connected with the transaction of crediting you with $1,938?

A. That was all in regard to this; yes, sir; in regard to this $2,000.

132. You are sure that there was no money passed over the counter?

A. I would not be positive; there might have been a little.

133. Do you know as a matter of fact?

A. I don't think there was, though.

134. Now, when did that note become due?

A. Came due about the 17th of September, 1885.

135. That note you gave in June, what did you do with it then?

A. The 17th of September?

136. Yes, sir.

A. Why, I renewed it; gave a new note and took up the old one.

137. Gave a new note and took up the old one?

A. Yes, sir.

40 138. Was that note that was surrendered to you cancelled?

Plaintiff objected as incompetent, immaterial, improper cross-examination. Objection overruled.

A. Why, yes, sir; it may not have been cancelled just that time.

139. It was when it was given to you, wasn't it—when it was given back to you?

A. Why, yes, sir.

140. It was cancelled?

A. Yes, sir.

141. Have you that note there in your hand?

A. Yes, sir.

(PHELPS:) That note itself is the best evidence as to whether it was cancelled or not.

(HODSDON:)

142. We will offer it, then, in evidence. We will offer in evidence note dated June the 16th, 1885, $2,000 ($2,000).

(PHELPS:) We will admit that every note when it became due, when it was renewed by giving a new note and paying interest in advance, was marked with the Schuyler National bank's stamp, having thereon the words "Schuyler National bank, paid," giving date, day of the month and year, followed by the words "Schuyler, Nebraska."

(Note not received in evidence; hence not marked.)

143. Now, Mr. Bollong, calling your attention to the transaction of the 17th of September, 1885, when did that note become due?

A. About the 17th of September; that is the first note.

144. I mean that note you gave on the 17th of September. When did that become due?

41 A. About the 19th of September (December); came due ninety days from the 17th of September.

145. What was done with it then?

A. The 19th of December?

146. When it matured, the 19th of December.

A. It was again renewed for ninety days.

147. State what steps were taken or what was done in connection with the renewal of it.

A. Why, they charged 18% at that time instead of 12. They charged me 12 before that.

148. What things were done? Go on and state fully.

A. Why, it was done just the same as the last; renewed it; gave a new note.

149. You executed a note for how much?

A. For $2,000.

150. Ninety days. What was done with the old note?

A. Why, I took up the old note.

151. And was that the way that all these notes that you gave in connection with this $2,000 transaction were treated? You have several notes in your hand there, have you not—$2,000?

A. Yes, sir.

152. And was that the way all the notes for this $2,000 were treated?

A. Renewed; yes, sir.

153. When they were renewed what was done with them—the note that you gave before?

A. The note was given back to me.

154. Was it cancelled in each case?

A. Yes, sir.

42 (PLAINTIFF:) Object to that now.

(Ans.) They were cancelled on — about the time—maybe a few days after.

155. Well, now, when was the last $2,000 note given?

A. It was given March 22nd—no; it was May the 24th.

156. Well, what became of that note?

A. Why, you sued it.

157. Where was it sued?

A. In the district court, in this county.

158. I will call your attention to the transaction had with the Schuyler National bank on the 18th day of July, 1885. State about that, Mr. Bollong—now, Mr. Bollong, state what took place there.

A. Why, I borrowed $1,200.

159. Did you give a note for that $1,200?

A. Yes, sir.

160. When did it mature?

A. It matured October 19th.

161. What year?

A. 1885.

162. What did you do when it matured?

A. I renewed it.

163. Well, tell us what you did in connection with that transaction. Did you go to the bank to request them to give you a new note or to accept a new note when it became due?

43 A. October 19th you mean?

164. That was the note that was given on July 18th, 1885, when that note matured, which would be when—19th day of October?

A. Yes, sir.

165. Now, what did you do then? Did you ask the bank if they would accept a new note or anything to that effect?

A. I don't remember.

166. What did you do on the 19th day of October?

A. Why, I renewed; I don't know whether it was just on the 19th.

167. No matter if it ain't just on that day, but about that time, what did you do to get a renewal?

A. I don't remember.

168. Well, did you ask them to accept a new note and surrender the old one, and was the old one surrendered?

A. It was not at that time.

169. When was it, if at all?

A. About the 20th of January.

170. That is the note that was given in July, I mean; that is what I am calling your attention to. I mean the note that was given in July. What was done with it?

A. Why, that was cancelled. I gave a new note and took up the old one.

171. They gave you back the old one?

A. Yes, sir.

172. Cancelled?

A. Yes, sir.

44 173. When the next note became due what did you do, dated the 19th day of October?

A. That is the one that was cancelled the 20th of January.

174. Well, now, that note that became due on the 20th of January, was that treated in the same way?

(PHELPS:) He has testified to that.

A. Why, yes, sir; that was renewed for four months.

175. What did you do about the note—the old note?

A. Why, I gave a new one and took up the old one.

176. What became of the old one—whose possession was it delivered into?

A. Here it is here.

177. Whose possession was it delivered into?
A. I got it.
178. You still have it?
A. Yes, sir.
179. Was it cancelled at the time of delivery?

(COURT:) I understand that all these notes were cancelled.
(HODSDON:) At the time of delivery.

180. The next note is dated January 20th, 1886?
A. That is the one we have been talking about.
181. Now, that matured January 20th; now, the one you executed on that date you executed for what time?
A. On the 20th of January for four months.
182. What time did that become due?
A. About the 24th of May.
183. Well, what did you do about it then?
A. I renewed it.
45 184. In what way did you renew it?
A. I renewed it for thirty days.
185. For the entire amount or for a less amount?
A. Why, I think for the entire amount.
186. And the old note, what was done with it?
A. Why, I have the old note here.
187. Surrendered to you, was it?
A. Yes, sir.
188. Now, that note that was given on the 22nd day of May, 1886, was given for what time?
A. Thirty days.
189. And would mature when?
A. Why it would mature about the 24th or 25th of June.
190. What became of that note?
A. Why that note you sued.
191. By whom sued?
A. The same as the other.
192. What court?
A. District court.
193. What county?
A. Colfax county.
194. You were one of the defendants in that suit, were you not?
A. Yes, sir.
195 Q. And The Schuyler National Bank was plaintiff?
A. Yes, sir.
196. Now, Mr. Bollong, let us see; did you ever pay this $2,000 note?
A. That was settled.
46 197. Did you pay it?
A. I paid all the——

Plaintiff objected as incompetent, immaterial, and improper cross-examination.

(COURT:) I think the evidence may go on in under the agreement.

The plaintiff disclaims any purpose on his part or any claim for the original interest reserved.

(HODSDON:) I asked him if that $2,000 note had ever been paid.

(PHELPS:) I object to that. Objected to as immaterial, incompetent, and not proper cross-examination.

The plaintiff disclaims any purpose on his part or any claim for $62, mentioned in the fourth cause of action in his petition as interest reserved and retained by the bank at the time of the execution and delivery of the original and first note executed for said sum of $2,000.

(COURT:) Do you mean by that that you dismiss that cause of action from the petition?

(PHELPS:) Yes; that is the effect of it.

The objection heretofore urged to the question whether the $2,000 note has been paid is overruled. Plaintiff excepted.

198. I will ask you, Mr. Bollong, whether that $1,200 note has ever been paid.

Object to it, and the plaintiff now says that he disclaims all purpose or claim to the sum of $55.80, described and set out in the ninth cause of action in his petition as interest reserved and retained by the bank on the 18th day of July, 1885, when the
47 original or first note for the $1,200 therein mentioned was given, and objects to the question asked by defendant's counsel. Objection overruled. Plaintiff excepted.

199. Mr. Bollong, I will go back and call your attention to these notes, taking the first note, the $800 note; has that ever been paid? Mr. Bollong, that $800 note, has that ever been paid, that you have testified to about in your examination-in-chief?

A. Why, no; it has not been paid.

200. This $2,000 note that you have testified about in your examination-in-chief, has that ever been paid?

A. Why the judgment you asked the court for?

(PHELPS:) Answer yes or no.

A. Well, it has.

201. Has the $1,200 note been paid?

A. Yes, sir.

202. When were they paid?

Plaintiff objected as incompetent, immaterial, and improper cross-examination. Objection overruled. Plaintiff excepted.

203. State when they were paid.

A. I don't remember the exact date, but I think about the first of December, 1887, or in December some time.

(PHELPS:)

204. 1887 or 1886?

A. 1887.

(HODSDON:)

205. You don't mean it was last December; this last December?
A. Why, in 1887, I think.
206. How long ago was it; you don't mean this last December?
A. Oh, no, no; a year ago, of course; yes. I was thinking about last year being 1888.
207. In the payment of these two notes you have testified to, Mr. Bollong, namely, the $2,000 note and the $1,200 note,
48 how much did you pay to satisfy them?

Plaintiff objected as immaterial and improper cross-examination. Objection overruled.

A. I don't remember how much.
208. Do you know somewhere near? State as near as you can.
A. I have no recollection of it how much there was. I don't remember how much there was; just what it was.
209. Can't tell?
A. No.

Redirect examination.

(PHELPS:)

210. Mr. Bollong, with reference to this stamping of the notes taken up by you, called cancellation, who made the cancellation?
A. Who? Which parties?
211. Yes, sir.
A. Sometimes the cashier and sometimes the president; mostly the cashier.
212. Was that made on your request or on the voluntary act, without request, of the bank's officers—that is, did they put that stamp on there of their own accord or did you request it?
A. They put it on of their own accord.
213. You never asked them to do it?
A. No, sir.
214. Or requested them to do it?
A. No, sir.
—. Nor had anything to do about it?
A. No, sir.

49 Recross-examination.

(HODSDON:)

215. Mr. Bollong, when these cancellations were made that you have testified to in response to Mr. Phelps' question you never made any objections, did you?
A. No.

Witness excused. Plaintiff rests.

Defendant's Testimony.

(HODSDON:)

216. If the court please, we offer in evidence the files in the case of The Schuyler National Bank against Neil R. Bollong and others in an action had and tried in this court at the November, 1886, term.

(PHELPS:) I want to object to all testimony offered under that plea.

The plaintiff objects to the receiving of any testimony by the defendant or to the introduction of any testimony by the defendant under the defendant's second defense upon the ground that said second defense does not state facts sufficient to constitute a cause of defense in favor of the defendant and against the plaintiff. Objection overruled. Plaintiff excepted. Objection passed on under the first agreement.

HODSDON: Defendant offers in evidence the files of the district court in the case of Schuyler National Bank against Neil R. Bollong and others in an action had and tried in this court at the November, 1886, term, the same being the petition in said cause, the answer therein, and the reply therein, case being No. 289.

Copies of the same hereto attached and marked Exhibits No. 1, 2, and 3.

50 (HODSDON:) Now, we offer in evidence the following papers in the files of the case of The Schuyler National Bank against Neil R. Bollong and others, being the case tried and determined in the November, 1886, terms of the district court of Colfax county, the petition, the answer, and reply, the case being No. 288.

Copies of the same hereto attached and marked Exhibits No. 4, 5, and 6.

Defendant offers journal entry in the case of Schuyler National Bank against Neil R. Bollong and others, No. 289, page 512, Journal No. 2, Colfax county:

"In the District Court of Colfax County.

Now, on this day, this cause coming on for hearing and trial to the court upon the issues joined, come the said parties, by their attorneys, and the trial proceeded, and the court, after hearing all the evidence adduced and the argument of counsel and being fully advised in the premises, do find that there is due from the said defendant- to the said plaintiff, as in the plaintiff's petition set forth, the sum of sixteen hundred eighty-nine $\frac{50}{100}$ dollars. It is therefore by the court considered that the said plaintiff do have and recover of and from the said defendant- the said sum of sixteen hundred eighty-five dollars, so as aforesaid found due, with interest thereon at ten per cent., as provided in the note sued on, and execution is awarded therefor."

It is further ordered that the plaintiff pay the costs, taxed at —— dollars, and execution issue therefor."

Defendant offers journal entry in the case of Schuyler National Bank against Hector C. Bollong and Neil R. Bollong, No. 288, page 512:

51 Now, on this day, this cause coming on for hearing and trial to the court on the issues joined, come the said parties, by their attorneys, and the trial proceeded, and the court, after hearing all the evidence adduced, the argument of counsel, and being fully advised in the premises, do find that there is due from the said defendant to the said plaintiff the sum of nine hundred ninety-four and $\frac{80}{100}$ dollars. It is therefore by the court considered, ordered, and adjudged that the said plaintiff do have and recover of and from the said defendants the said sum of nine hundred ninety-four $\frac{80}{100}$ dollars so as aforesaid found due, with interest thereon at ten per cent. per annum, as provided in the note sued on.

It is further ordered that the plaintiff pay the costs of this action, taxed at — dollars, and execution is issued — awarded therefor.

The defendant, further to maintain the issues on its part, produced NEIL R. BOLLONG (recalled) as a witness, who testified as follows:

(HODSON:)

217. Mr. Bollong, you recollect the two judgments rendered against you here in the district court a year ago last fall or ear-y part of the winter?

A. Which two have you reference to?

218. There were two, were there not, a year ago last fall in the district court by the Schuyler National bank? I simply ask you whether there were two judgments rendered against you in favor of the Schuyler National bank a year ago last December in this court.

52 A. I don't know whether there was one or two.

219. There was two notes sued on?

A. Yes, sir; there was two notes.

220. And two judgments. I think you testified that you satisfied those.

A. How is that?

221. You have testified that you have satisfied those, have you not?

(PHELPS:) Plaintiff objects as leading, improper, and immaterial.

Witness excused.

Defendant rests.

EXHIBITS.

(Copy.)

EXHIBIT No. 1 (CASE 289).

In the District Court of Colfax County, Nebraska.

THE SCHUYLER NATIONAL BANK, Plaintiff,
vs.
NEIL R. BOLLONG and NEIL BOLLONG, Defendants.

Petition.

1. The plaintiff says that it is a corporation duly organized under the laws of the United States of America and having its principal office of business at Schuyler, in the county of Colfax and the State of Nebraska.

2. It complains of the defendants, for that on the 24th day of May, 1886, the said defendants made, executed, and delivered to the plaintiff a promissory note, of which the following is a true copy, to wit:

53 " 2,000. SCHUYLER, NEB., *May 24th*, 1886.

" Thirty days after date we or either of us promise to pay to the Schuyler National bank or order two thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the Schuyler National bank, Schuyler Nebraska, with interest at the rate of ten per cent. per annum, payable annually, from maturity until paid.

" Due June 23–26.

" (Signed) N. R. BOLLONG.
" (Signed) NEIL BOLLONG."

3. No part thereof has been paid, and there is now due thereon from the defendants to the plaintiff the sum of two thousand dollars, with interest thereon at ten per cent. per annum from June 26th, 1886.

The plaintiff therefore prays judgment against the said defendants for the sum of two thousand —, with interest thereon from June 23rd, 1886, at the rate of ten per cent. per annum, payable annually, and its costs of suit.

E. T. HODSDON,
Attorney for the Plaintiff.

THE STATE OF NEBRASKA, *Colfax County,* } *ss:*

I, E. T. Hodsdon, being first duly sworn, on oath depose and say that I am the duly authorized attorney for the plaintiff in the above-entitled action; that the plaintiff is a corporation and that the petition is founded upon a written instrument for the payment

of money, and such instrument is now in my possession, and that these are the reasons why said petition is verified by plaintiff's attorney, and that the facts stated in the foregoing petition are true, as I verily believe.

E. T. HODSDON.

54 Subscribed in my presence and sworn to before me this 25th day of September, A. D. 1886.

T. W. WHITMAN,
[SEAL.] *Clerk Dist. Court.*

(Endorsed on the back thereof is the following:) District court. The Schuyler National Bank *vs.* Neil Bollong *et al.* Petition. No. 289. Filed Sep. 25, 1886. T. W. Whitman, clerk dist. court, Colfax Co., Neb. E. T. Hodsdon, att'y.

EXHIBIT No. 2, CASE 289.

District Court of Nebraska, Colfax County.

THE SCHUYLER NATIONAL BANK
vs.
NEIL R. BOLLONG and NEIL BOLLONG.

Answer.

Now comes the defendant Neil R. Bollong and, for answer to the plaintiff's petition herein filed, says:

First. That said defendant admits the execution and delivery of the promissory note described in said petition in manner and form as therein set forth, and that no payments have been made upon said promissory note.

Second. The said defendant, further answering, says that on the 16th day of June, 1885, he borrowed from the plaintiff said sum of $2,000.00 for the term of ninety days, and that upon said 16th day of June, 1885, he paid to the plaintiff and the plaintiff received as interest for said sum of $2,000.00 for ninety days the sum of $62.00; that upon the 17th day of September, 1885, the defendant executed and delivered to the plaintiff a new note for said sum of $2,000.00,

55 and upon said 17th day of Sept., 1885, paid to the plaintiff and the plaintiff contracted for and received from the defendant $62.00 as and for interest on said sum of $2,000.00 for the term and time of ninety days; that upon the 19th day of December, 1885, the defendant executed and delivered to the plaintiff a new note for said sum of $2,000.00, and upon said 19th day of December paid to the plaintiff and the plaintiff contracted for and received from the defendant $94.00 as and for interest on said sum of $2,000.00 for the term and time of ninety days; that upon the 22nd day of March, 1886, the defendant executed and delivered to the plaintiff a new note for said $2,000.00, and upon said 22nd day of March, 1886, paid to the plaintiff and the plaintiff contracted for and received from the defendant $62.00 as and for interest on

said sum of $2,000 for the term and time of 60 days; that upon the 24th day of May, 1886, the note described in the plaintiff's petition was made and delivered to the plaintiff for the said loan of $2,000, and upon said 24th day of May, 1886, he paid to the plaintiff and the plaintiff contracted for and received from the defendant $31.50 as and for interest on said sum of $2,000.00 for the term and time of thirty days and no more.

That the rate of interest upon said sum of $2,000.00 contracted for and agreed upon between the plaintiff and this defendant was 12 per cent. per annum from the 16th day of June, 1885, to the 19th day of December and 18 per cent. per annum from the 19th day of December, 1885, to the 23rd day of June, 1886.

The defendant admits that there is due to the plaintiff upon said promissory note the sum of $1,689.50 and no more.

Wherefore defendant prays that the sum of $311.50, illegal interest so as aforesaid paid, contracted for, and received, may
56 be deducted from the amount mentioned in said note, and that the costs of this action be taxed to the plaintiff.

THE STATE OF NEBRASKA, }
Colfax County, } *ss:*

Neil R. Bollong, being first duly sworn, deposes and says that he is one of the defendants mentioned in the above-entitled action, and that the facts stated in the foregoing answer of his — are true, as he verily believes.

NEIL R. BOLLONG.

Subscribed in my presence and sworn to before me this 9th day of November, 1886.

T. W. WHITMAN,
Clerk Dist. Court, Colfax County, Neb.,
[SEAL.] By ALLEN CAMERON, *Deputy.*

(Endorsed on the back thereof is the following:) Dist. court, Colfax county. Schuyler Nat. Bank, *vs.* N. R. Bollong and Neil Bollong. Answer. No. 289. Filed No. 10, 1886. T. W. Whitman, clerk dist. court, Colfax Co., Neb.

EXHIBIT No. 3 (CASE 289).

In the District Court of Colfax County, Nebraska.

THE SCHUYLER NATIONAL BANK }
vs.
NEIL R. BOLLONG and NEIL BOLLONG. }

Reply.

The plaintiff, in reply to the answer of the defendant, denies each and every allegation of new matter therein contained.

E. T. HODSDON,
Attorney for Plaintiff.

THE STATE OF NEBRASKA, } ss:
Colfax County, }

57 W. H. Sumner, being first duly sworn, on oath deposes and says that he is the cashier of the Schuyler National bank; that said plaintiff is a corporation, and that he believes the facts stated in the foregoing reply to be true.

W. H. SUMNER.

Subscribed in my presence and sworn to before me this 11th day of November, 1886.

M. T. BOHMAN,
Justice of the Peace.

(And endorsed on the back is the following:) District court. Schuyler National Bank *vs.* Neil R. Bollong *et al.* Reply. Filed No. 12, 1886. T. W. Whitman, clerk dist. court, Colfax county, Neb. E. T. Hodsdon, att'y.

EXHIBIT NO. 4 (CASE 288).

In the District Court of Colfax County, Nebraska.

THE SCHUYLER NATIONAL BANK, Plaintiffs,
vs.
NEIL R. BOLLONG, NEIL BOLLONG, and JOHN M. G. CURRY, Defendants.

Petition.

1. The plaintiff says that it is a corporation duly organized under the laws of the United States of America and having its principal office of business at Schuyler, in the county of Colfax and the State of Nebraska.

2. It complains of the defendant-, for that on the 22nd day of May, A. D. 1886, the said defendants made and executed and delivered to the plaintiffs a promissory note, of which the following is a true copy, to wit:

"$1,200. SCHUYLER, NEB., *May 22nd*, 1886.

Thirty days after date we or either of us promise to pay to the Schuyler National bank or order twelve hundred dollars, for
58 value received, negotiable and payable, without defalcation or discount, at the Schuyler National bank, Schuyler, Neb., with interest at the rate of ten per cent. per annum, payable annually, from maturity until paid.

Due June 21–24.

(Signed) N. R. BOLLONG.
(Signed) NEIL BOLLONG.
(Signed) J. M. G. CURRY."

3. No part thereof has been paid, and there is now due thereon from the defendants to the plaintiff the sum of twelve hundred

dollars, with interest thereon at ten per cent. per annum from June 21st, 1886.

The plaintiff therefore prays judgment against the said defendants for the sum of twelve hundred dollars, with interest thereon from May 22nd, 1886, at the rate of ten per cent. per annum, payable annually, and its cost of suit.

E. T. HODSDON,
Attorney for the Plaintiff.

THE STATE OF NEBRASKA, } ss:
Colfax County, }

I, E. T. Hodsdon, being first duly sworn, on oath depose and say that I am the duly authorized attorney for the plaintiff in the above-entitled action; that the plaintiff is a corporation, and that the petition is founded upon a written instrument for the payment of money only, and such instrument is now in my possession, and that these are the reasons why said petition is verified by plaintiff's attorney, and that the facts stated in foregoing petition are true, as I verily believe.

E. T. HODSDON.

59 Subscribed in my presence and sworn to before me this 25th day of September, A. D. 1886.

[SEAL.] T. W. WHITMAN,
Clerk Dist. Court.

(Endorsed on the back thereof is the following:) District court. The Schuyler National Bank *vs.* Neil R. Bollong *et al.* Petition. No. 288. Filed Sep. 25, 1886. T. W. Whitman, clerk dist. court, Colfax Co., Neb. E. T. Hodsdon, att'y.

EXHIBIT No. 5 (CASE 288).

District Court of Nebraska, Colfax County.

THE SCHUYLER NATIONAL BANK
vs.
NEIL R. BOLLONG and JOHN M. G. CURRY *et al.*

Answer.

Now comes the defendant Neil R. Bollong and for an answer to the plaintiff's petition herein says:

First. That he admits the execution and delivery of the promissory note described in said petition in manner and form as therein set forth, and that no payments have been made upon said promissory note.

Second. The said defendant, further answering, says that said promissory note in said petition mentioned was given by the defendant to the plaintiff for the loan of $1,200.00; that said $1,200.00 was first borrowed from the plaintiff by this defendant on the 18th day of July, 1885; that upon said 18 day of July, 1885, it was con-

tracted and agreed by and between the plaintiff and this defendant that the sum of $55.80 should — reserved and kept back from said sum of $1,200.00, and that said sum of $55.80 was upon
60 said day reserved and paid to said plaintiff as and for interest upon said sum of $1,200.00 for the term and time of ninety days and no more, and that out of said loan of $1,200.00, so made on the 18th day of July, 1885, the defendants received the sum of $1,144.20/100 and no more; that upon the 19th day of October, 1885, the defendants made a new note for said sum of $1,200.00, and upon said 19th day of October, 1885, paid to the plaintiff and the plaintiff contracted for and received from this defendant $55.90 as and for interest upon said sum of $1,200.00 for the term and time of ninety days and no longer; that upon the 20th day of January, 1886, — paid to the plaintiff and the plaintiff contracted for and received from this defendant $73.80 as and for interest upon said sum of $1,200.00 for the term and time of four months and no longer; that upon the 22nd day of May, 1886, the promissory note mentioned in the plaintiff's petition was made and delivered to the plaintiff in consideration for and as a renewal of said above-mentioned notes and for said sum of $1,200.00 so as aforesaid borrowed from the plaintiff by this defendant on the 18th day of July, 1885, and that upon said 22nd day of May, 1886, this defendant paid to and the plaintiff contracted for and received from this defendant the sum of $19.80 as and for interest upon said sum of $1,200.00 for the term and time of 30 days and no longer; that the rate of interest upon said sum of $1,200.00 contracted for and agreed upon between the plaintiff and this defendant and paid by this defendant was 18 per cent. per annum from the 18th day of July, 1885, to the 21st day of June, 1886.

The defendant admits that there is due to the plaintiff upon said promissory note the sum of $994.80/100 and no more.

61 Wherefore the defendant prays that the sum of $149.40, illegal interest so as aforesaid paid, contracted for, and received, may be deducted from the amount which this defendant received upon said loan, to wit, $1,144.20, and that the costs of this action be taxed to the plaintiff.

THE STATE OF NEBRASKA, } ss:
Colfax County, }

Neil R. Bollong, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action, and that the facts stated in the foregoing answer of his — are true, as he verily believes.

NEIL R. BOLLONG.

Subscribed in — presence and sworn to before me this 9th day of November, 1886.

T. W. WHITMAN,
Clerk Dist. Court, Colfax Co., Neb.,
By ALLAN CAMERON, *Deputy.*

[SEAL.]

(Endorsed on the back thereof is the following:) Dist. court, Colfax county. The Schuyler Nat. Bank *vs.* N. R. Bollong, Neil Bollong, and J. M. G. Curry. Answer. No. 2, 288. Filed Nov. 10, 1886. T. W. Whitman, clerk dist. court, Colfax county, Neb.

EXHIBIT No. 6 (CASE 288).

In the District Court of Colfax County, Nebraska.

THE SCHUYLER NATIONAL BANK
vs.
NEIL R. BOLLONG, NEIL BOLLONG, and J. M. G. CURRY.

Reply.

The plaintiff, in reply to the answer of the defendant, denies each and every allegation of new matter therein contained.

E. T. HODSDON,
Attorney for Plaintiff.

62 THE STATE OF NEBRASKA, } ss:
Colfax County, }

W. H. Sumner, being first duly sworn, on oath deposes and says that he is the cashier of the Schuyler National Bank; that said plaintiff is a corporation, and that he believes the facts stated in the foregoing reply to be true.

W. H. SUMNER.

Subscribed in my presence and sworn to before me this 11th day of November, A. D. 1886.

M. T. BOHMAN,
Justice of the Peace.

(Endorsed on the back thereof is the following:) District court. Schuyler National Bnak *vs.* Neil R. Bollong *et al.* Reply. Filed Nov. 12, 1886. T. W. Whitman, clerk dist. court, Colfax Co., Neb. E. T. Hodsdon, att'y.

STATE OF NEBRASKA, } ss:
Dodge County, }

I, Edwin R. Mockett, one of the stenographic reporters in and for the fourth judicial district of Nebraska, do hereby certify that the above and foregoing is a true, full, and correct transcript of all evidence offered and given by the respective parties upon the trial of the above-entitled cause, together with the objections and exceptions of the said parties and the rulings of the court upon said objections.

EDWIN R. MOCKETT,
Reporter, Fourth Judicial District.

63 The above and foregoing is all the evidence given or offered by said parties on the trial of the above-entitled cause. The

same is hereby allowed and ordered to be made part of the record in said cause.

Dated this 1st day of August, 1888.

WILLIAM MARSHALL, *Judge.*

On this 14th day of July, 1888, received from C. J. Phelps and J. A. Grimison, attorneys for the plaintiff, the annexed bill of exceptions, which is submitted for examination, correction, and approval.

E. T. HODSDON,
Att'y for the Def't.

I herewith return the draft of the bill of exceptions in the case of Neil R. Bollong *vs.* The Schuyler National Bank of Schuyler, Nebraska, submitted to me on the 14th day of July, A. D. 1888, and have no amendments to propose.

Schuyler, Neb., July 23d, '88.

E. T. HODSDON,
Att'y for Defendant.

STATE OF NEBRASKA, } *ss:*
Colfax County, }

I, F. C. Reinecke, clerk of the district court of Colfax county, Nebraska, do hereby certify that the foregoing is the original bill of exceptions in said cause, and also a true and perfect transcript of the amended petition, answer, reply, motion by plaintiff for a new trial, and finding of the court in said action as the same are on file and of record in my office.

Witness my hand and seal this first day of August, A. D. 1888.

[SEAL.] F. C. REINECKE, *Clerk.*

(Endorsed:) 3276. Neil R. Bollong *v.* Schuyler Nat'l B'k. Filed Aug. 1, 1888. F. C. Reinecke, clerk dist. court, Colfax Co., Neb. Supreme court of Nebraska. Filed Aug. 4, 1888. Guy A. Brown, clerk.

64 And on the same day, to wit, on the 4th day of August, 1888, there was issued out of said court a certain summons in the words and figures following, to wit:

THE STATE OF NEBRASKA, *ss:*

To the sheriff of the county of Colfax:

You are hereby commanded to notify the Schuyler National Bank of Schuyler, Nebraska, that a petition in error has been filed in the supreme court of the State of Nebraska by Neil R. Bollong asking the reversal of a judgment rendered June 11, 1888, in a certain cause in the district court of — county, wherein said Bollong was plaintiff and said bank defendant, and to appear before the supreme court, at the city of Lincoln, on the 1 day of January, 1889, then and there to do and receive what the said supreme court shall order in the premises.

You will make due return of this summons on or before the 1 day of January, 1889.

Witness my hand and the seal of said court, at the city of Lincoln, this 4 day of August, 1888.

[SEAL.] GUY A. BROWN, *Clerk.*

(Endorsed:) General No., 3276. Supreme court, State of Nebraska. Neil R. Bollong *vs.* Schuyler Nat'l Bank. Summons in error.

And afterwards, to wit, on the 24th day of August, 1888, there was returned to and filed in the office of the clerk of said court said summons, endorsed as follows:

I hereby accept service of the within summons in error this 13th day of August, A. D. 1888.

E. T. HODSDON,
Att'y for the Def't in Error.

[Endorsed:] Supreme court of Nebraska. Filed Aug. 24, 1888. Guy A. Brown, clerk.

65 And afterwards, to wit, on the 20th day of March, 1889, the following judgment was rendered by said court and entered of record, to wit:

NEIL R. BOLLONG, Plaintiff, *vs.* SCHUYLER NATIONAL BANK, Defendant.	Error from the District Court of Colfax County. No. 3276.

This cause came on to be heard, was taken up and argued by counsel; on consideration whereof the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that the said judgment be, and the same hereby is, affirmed, and that the defendant recover of the plaintiff his costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, on the 20th day of March, 1889, there was filed in the office of the clerk of said court a certain opinion in the words and figures following, to wit:

66 *Opinion.*

Supreme Court, State of Nebraska.

NEIL R. BOLLONG
v.
SCHUYLER NATIONAL BANK.

REESE, *Ch. J.:*

This action was instituted in the district court of Colfax county for the recovery, under section 5198 of the Revised Statutes of the United States, of twice the amount of illegal interest alleged to have

been paid defendant in error, it being organized as a national bank under and in pursuance of the laws of the United States.

The petition contained twelve counts or separate causes of action, each being based upon a payment of illegal interest alleged to have been made to the bank; the total amount for which judgment was demanded was $707.10.

The answer of the defendant contained, among other things, the allegation that as to the fourth, fifth, sixth, seventh, eighth, nineth, tenth, eleventh, and twelfth causes of action contained in the petition that prior to the commencement of this action defendant instituted two several actions against the plaintiff in the district court of Colfax county upon the notes which were the evidences of the indebtedness upon which the several payments of illegal interest were alleged to have been made, and that in said actions plaintiff presented as defenses the same facts which are set out in said counts of his petition in this case, and that upon issue being joined thereon
the district court, upon a hearing of the causes, upon trial
67 found in his favor and rendered judgment thereupon in accordance with said findings, and that the whole matter presented in the courts referred to in plaintiff's petition had been adjudicated in such actions.

A reply was filed by which all the allegations of the answer were denied.

A trial was had to the court and upon which it found in favor of plaintiff upon the causes of action set out in the second and third counts and rendered judgment against the bank for the sum of $236.00. Plaintiff brings the cause into this court by proceedings in error and assigns for error that the court erred in its finding against him on the fifth, sixth, seventh, eighth, tenth, eleventh, and twelfth causes of action; that the findings and decision are not sustained by sufficient evidence and are contrary to law.

It appears from the evidence introduced upon the trial that at a time prior to the commencement of this suit, the date of which is not given, the defendant instituted its action against plaintiff for the sum of $2,000.00, alleged to be due upon a promissory note signed by plaintiff, dated May 24th, 1886, and due thirty days after date, and that plaintiff in his answer to the petition admitted the execution and delivery of the note and alleged as a defense thereto that on the 16th day of June, 1885, he borrowed from defendant the sum of $2,000.00 for ninety days and paid to it as interest thereon the sum of $62.00, and that at divers other times set out in the answer the note was renewed and usurious interest collected by defendant.

The answer contained an admission that "there is due to the plaintiff upon said promissory note the sum of $1,689.50 and no more."
68 The prayer of the answer was that said sum of $311.50, illegal interest paid, might be deducted from the amount named in the note, and that the costs of the action be taxed to the plaintiff. Upon a trial in that case being had, judgment was rendered in favor of defendant, who was plaintiff in the action, for the

sum of $1,689.50, the amount confessed in the answer, and costs were taxed to it.

It further appears that another action had been instituted against plaintiff by defendant upon a note of $1,200.00 in the same court, and that answer was filed, presenting at length the defense of usury, admitting that there was due defendant the sum of $994.80 and no more, and praying that the sum of $149.40, the alleged usurious interest, be deducted from the original amount received.

The result of the trial in that case was a judgment in favor of defendant for the sum of $994.80, the amount confessed in the answer, and the taxation of the costs to it.

It clearly appears that the usury mentioned in the answers in the two cases referred to is the same as that which is alleged in plaintiff's petition in this case, and that in these actions the illegal interest received was applied as payment on the original indebtedness under the provisions of the interest laws of this State.

The contention of the plaintiff is that the judgments in the suits, to the extent of allowing him credit for the illegal interest paid, were void and are not a bar to this proceeding, notwithstanding they were rendered in his favor upon his answer in the nature of a cross-petition, and that he has received the benefit thereof.

69 The question has been ably presented by counsel on either side, both by oral arguments and briefs, and is to our mind not free from difficulty.

As it has been held by this court in Bank *v.* Overman, 34 N. W. Rep., 107, that State courts have jurisdiction to enforce the collection of the penalty prescribed by section 5198 of the Revised Statutes of the United States for taking illegal interest, it might be contended with quite a degree of reason that under the provisions of sections 100 and 101 of the Civil Code the penalty given by the law of Congress, where it arises out of the transaction which forms the basis of a plaintiff's suit, might be pleaded as a counter-claim and allowed as such; and were this the correct view it is clear that plaintiff could not recover in his case for the reason that in the former suits he presented by his answer the same facts which are now set up in his petition, and that the district court, by his procurement, erred in not giving the full relief prescribed by the law of Congress, and that the judgment would not for that reason be void; but it may be that in Burnett *v.* Bank, 98 U. S. S. C., 555, the Supreme Court of the United States have held otherwise, and that no proceeding could be maintained for the enforcement of the remedy given by section 5198 other than by a separate and independent action of debt. We think the case referred to scarcely reaches to that extent, as it does not clearly appear that the claim presented in that case, for twice the amount of interest paid, was based upon the same transaction or contract set forth in the petition.

As we deem it unnecessary to decide that question in this case, our decision will be based upon other and different grounds.

70 It may be conceded as contended by plaintiff that the defense of usury, under the interest laws of this State, cannot be pleaded in an action instituted by a national bank as a legal de-

fense, and that the State courts have no jurisdiction to enforce the penalties prescribed by State law, and that the decisions of the district court in the former cases were erroneous or even voidable, and yet we cannot see that the plaintiff can again recover.

In other words, that plaintiff having availed himself of a supposed remedy and having received a judgment in his favor upon his answer and cross-petition without objection, and having accepted the result, he is estopped from subsequently objecting to the authority of the court to render the judgment.

The district court, by which the former judgments were rendered, was a court of general jurisdiction. While it may be true, as hereinbefore intimated, that by the rule in Burnett *v.* Bank, 98 U. S., 555, it was error for such court to render judgment under the usury laws of this State, yet we are not aware of any rule which can be applied which would render the judgment absolutely void, no objection having been made at the time and the case having been allowed to go to judgment. If it could be said that it was the duty of the district court to strike plaintiff's defenses from his answer in these cases and order them to be made the subject of separate and independent actions, yet its failure to do so could not render its judgments void as one without jurisdiction of the parties or of the subject-matters; the most that can be said is that it had not jurisdiction over the subject-matter in that form of action, but it did have jurisdiction in a proper proceeding. The procedure
71 having been had without objection by either party and at the instigation of plaintiff in this action, we think the judgment was not only not void, but that plaintiff would be estopped to question its validity to the extent of instituting another action for an additional recovery upon the same facts upon which his former recovery was had.

While the application of the principles here announced to cases exactly like the one at bar may not be frequent, yet we think they should be so applied.

The legal propositions are elementary, and of the many cases cited by counsel for defendant we need refer but to Herman on Estoppel and *res judicata*, section 51 *et seq.*, and cases there cited, Edwards *v.* Stewart, 15 Barb., 67, and Blair *v.* Bartel, 75 N. Y., 150.

The judgment of the district court is affirmed.

Affirmed.

The other judges concur.

72 And afterwards, to wit, on the 2nd day of May, 1889, there was filed in the office of the clerk of said court a certain bond in the words and figures following, to wit:

Bond.

Know all men by these presents that we, The Schuyler National Bank of Schuyler, Nebraska, and Edward L. True, of Schuyler, in the county of Colfax and State of Nebraska, are held and firmly bound unto Neil R. Bollong, of Schuyler, Colfax county, Nebraska,

in the full and just sum of five hundred dollars ($500) to be paid to the said Neil R. Bollong, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a term of the district court held in and for the county of Colfax, in the State of Nebraska, in a suit pending in said court, a judgment was rendered against the said Schuyler National Bank of Schuyler, Nebraska, in the sum of two hundred and thirty-six dollars ($236) and costs, and subsequently said suit was taken by a proceeding in error to the supreme court of the State of Nebraska, and after being there duly heard said judgment was in all respects duly affirmed in the said supreme court and a final judgment was therein rendered for said sum of two hundred and thirty-six dollars ($236) and costs, and the said bank having obtained an allowance of a writ of error by order of the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United
73 States, to reverse said judgment in the aforesaid suit, and a citation directed to the said Neil R. Bollong, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next:

Now, the condition of the above obligation is such that if the said Schuyler National Bank of Schuyler, Nebraska, and Edward L. True shall prosecute the writ of error to effect and answer all damages and costs and pay said judgment if he fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SCHUYLER NATIONAL BANK
OF SCHUYLER, NEBR.,
By its cashier, W. H. SUMNER.
EDWARD L. TRUE.

Approved.
SAM. F. MILLER,
Justice Sup. C'rt.

THE STATE OF NEBRASKA, }
Colfax County, } *ss:*

Edward L. True, being first duly sworn, upon oath says that he is a resident of Schuyler, Colfax county, in the State of Nebraska; that he is the owner of real estate in said Colfax county, State of Nebraska, of the value of three thousand dollars, and he is also the owner of personal property situated in said county and State of the value of five thousand dollars; that he — worth over and above all debts, liabilities, and exemptions the sum of eight thousand dollars; and further deponent saith not.

EDWARD L. TRUE.

74 Subscribed in my presence and sworn to before me this 17th day of April, A. D. 1889.

[SEAL.] EDW'D T. HODSDON,
Notary Public.

(Endorsed:) 3276. Schuyler National Bank of Schuyler, Nebr., *vs.* Neil R. Bollong. Bond. Supreme court of Nebraska. Filed May 2, 1889. Guy A. Brown, clerk.

75 STATE OF NEBRASKA, *ss:*

I, Guy A. Brown, clerk of the supreme court of said State, do hereby certify that the foregoing is a true and perfect transcript of the record in an action lately pending in said court wherein Neil R. Bollong was plaintiff and The Schuyler National Bank was defendant, as the same is on file and of record in my office.

In testimony whereof I have hereunto set my hand and the seal of said court this 9th day of May, A. D. 1889.

[Seal Supreme Court of Nebraska.]

GUY A. BROWN, *Clerk.*

Fee for this transcript, $17.30.

Endorsed on cover: Case No. 13,868. Nebraska supreme court. No. 254. The Schuyler National Bank of Schuyler, Nebraska, plaintiff in error, *vs.* Neil R. Bollong. Filed October 21, 1889.

150 U.S. 90

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JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 39.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, PLAINTIFF IN ERROR,

vs.

NEIL R. BOLLONG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Brief of the Plaintiff in Error.

WILLIAM TWOMBLY,
J. G. BIGELOW,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 39.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, PLAINTIFF IN ERROR,

vs.

NEIL R. BOLLONG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Brief of the Plaintiff in Error.

This case, like the preceding case, No 38, is for the recovery of double the amount of alleged usurious interest charged by the plaintiff in error.

On the 19th of September, 1887, the defendant in error filed his amended petition in the District Court of Colfax County, Nebraska. Therein are twelve separate causes of action undertaken to be stated against the bank (Rec., 5 to 9), and in each it is alleged that the cause of action accrued to the defendant in error by reason of the violation, by the bank, of Section 5198, Revised Statutes, U. S. No mention nor reference is made to Section 5197.

Although in the record at page 13, it is recited that this cause came to a trial in the District Court of Colfax County, before William Marshall, Judge, on the 17th of February, 1888, and "the following evidence and testimony *was* introduced and given to the court and *jury*," it is gathered elsewhere from the record that a jury was waived and a trial

had by the court, for on page 11 we find, "the court finds for the plaintiff in the sum of $236.00," and then follows: "In this case judgment should be entered for the plaintiff for $236.00, the same being the amount of usurious interest paid by the plaintiff as set out in his second and third causes of action. Upon the other causes of action the finding is for the defendant. Cost should be taxed to the defendant," signed by the presiding judge.

The second and third causes of action (Rec., 6) are all there is of the complaint before this court for its judgment on this writ of error. In neither of these causes of action is it alleged that the indebtedness therein mentioned has ever been paid to the bank.

It appears that both parties moved for a new trial, although the record contains the motion only of the plaintiff below (Rec., 12). The cause was carried to the Supreme Court of the State by writ of error sued out by the plaintiff below (Rec., 4), where the judgment of the lower court was affirmed March 20, 1889 (Rec., 38 to 41). And thereupon the defendant below sued out writ of error to this court (Rec., 1).

There is a stipulation between the parties that this cause together with Nos. 38, 317 and 518, may be heard as one case upon the record of such one of them as plaintiff in error may select. The plaintiff in error has selected No. 518, and as precisely the same questions are involved in this action as in that, we refer to our brief and argument therein, and make the same a part hereof.

And we respectfully submit that the Supreme Court of Nebraska ought to be reversed for the reasons therein given.

WILLIAM TWOMBLY,
J. G. BIGELOW,
Attorneys for Plaintiff in Error.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1893. NO. 39.

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v.

NEIL R. BOLLONG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Brief of Defendant in Error.

C. J. PHELPS,
J. A. GRIMISON,
C. O. SABIN,
Attorneys for Defendant in Error.

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And we respectfully submit that the Supreme Court of Nebraska ought to be reversed for the reasons therein given.

WILLIAM TWOMBLY,
J. G. BIGELOW,
Attorneys for Plaintiff in Error.

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v.

NEIL R. BOLLONG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Brief of Defendant in Error.

C. J. PHELPS,
J. A. GRIMISON,
C. O. SABIN,
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. NO. 39.

THE SCHUYLER NATIONAL BANK, OF SCHUYLER, NEBRASKA, PLAINTIFF IN ERROR,

v.

NEIL R. BOLLONG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Brief of Defendant in Error.

This action was originally brought by the defendant in error against the plaintiff in error, in the District Court of Colfax County, Nebraska, to recover the penalty provided in section 5198 of the Revised Statutes of the United States, for receiving, &c., usurious interest.

On the trial judgment was rendered in favor of defendant in error in the sum of $236 and costs (Rec., 11).

Defendant in error prosecuted an appeal, on error, to the Supreme Court of Nebraska, where the judgment was affirmed (Rec., 41).

The record does not show that the plaintiff in error filed a motion in arrest of judgment and for a new trial,

and it did not prosecute appeal on error to the Supreme Court of Nebraska. This court, therefore, is without jurisdiction to hear and determine the case upon the errors alleged by plaintiff in error.

The statement of the case made by the plaintiff in error is controverted.

On the 13th day of August, 1887, the defendant in error filed his original petition in this case in the District Court of Colfax County, Nebraska, against the plaintiff in error.

On the 19th day of September, 1887, defendant by leave of the court, filed in said District Court his amended petition (Rec., 5) demanding judgment against plaintiff in error for double the amount of sundry charges of usurious interest theretofore exacted from him by the plaintiff in error.

On the 15th day of November, 1887, the plaintiff in error, after the disposal of numerous dilatory motions interposed by plaintiff, the plaintiff in error filed its answer (Rec., 10) denying generally every allegation in defendant's petition, to which answer defendant in error filed his reply, denying every allegation of new matter contained in said answer.

Afterwards, and upon the trial of the issues, the court, upon consideration of the pleadings, proofs, and arguments of counsel entered the findings and judgment sought to be reversed in this suit in this court.

The defendant's said petition definitely states that the

plaintiff in error is a corporation duly organized and doing business under and by virtue of the laws of Congress relating to national banks, at Schuyler, in said Colfax County, as a banking association and was so organized and doing business during the happening of each and all the events and facts complained of in said petition. In each cause of action set out in said petition it is distinctly alleged, as the fact existed, that the defendant in error, on a certain day named, either borrowed, or, being indebted to the plaintiff in error, as the fact existed, in a specific amount named, executed a promissory note, of that date, therefor, due a certain number of days named thereafter; that on that day the plaintiff knowingly contracted for and retained, or received, as the fact was, a specific sum of money named, as and for interest on the amount borrowed, or owing, for the time and term therein named; that the payment of interest made by defendant to plaintiff, and by plaintiff knowingly contracted for and received, was at a greater rate of interest than is allowed by the laws of Nebraska, stating the rate per annum contracted for and paid, and that it was in violation of section 5198 of the Revised Statutes of the United States, corrupt and usurious, and occurred within two years prior to the commencement of the action, and by the violation of the statutes of the United States the plaintiff became and was indebted to defendant in a sum named, the amount so named being twice the amount of the unlawful inter-

est so contracted for, received and paid. To say that this manner of demanding judgment for twice the amount of unlawful interest taken, upon the facts alleged, is to declare that pleading facts from which the material fact is inferred is not sufficient is a statement of the law of pleading sadly at variance with the law as generally understood.

The first error assigned by plaintiff in error in its brief is, "the complaint of the plaintiff below is fatally defective in that it contains no averment negativing the exception in section 5197 Revised Statutes United States, viz: 'except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title.'"

There are no banks of issue "organized under State laws" in Nebraska. There is no State law in Nebraska authorizing such banks, and, of course, there is no provision in the laws of Nebraska providing a different rate of interest for banks of issue organized under State laws. Moreover, there is no rule of law in the code governing civil procedure and pleadings in Nebraska that either requires or recognizes as proper the pleading of either the existence or nonexistence of a statute of the State. The courts in Nebraska, as everywhere else, take judicial notice of the laws of the jurisdiction in which they sit.

Again, the provision in section 5197 "except that where by the laws of any State a different rate is limited for banks of issue organized under State laws the rate so limited shall be allowed for associations organized or existing in any such State under this title," does not apply to states having no banks of issue, or laws regulating interest charges by such banks, and does not apply to national banks in Nebraska.

But as applied to Nebraska is simply a matter of law, of which the Nebraska court takes judicial notice, whereas in a state with such banks of issue as are included in said exception, it becomes a question of fact. And this view was held by the Supreme Court of North Carolina in Morgan v. First National Bank of Charlotte, 93 North Carolina, 352.

The 4th error assigned in plaintiff's brief is: "That there is a fatal variance between the allegations of the complaint of the plaintiff below and the requirement of said sections of the Revised Statutes."

The code of civil procedure of Nebraska governing pleading in actions at law both in the Federal and State courts in Nebraska provides: "No variance between the allegations in a pleading, and the proof is to be deemed material unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits," and "Whenever the variance is not material, as provided (above) in the last section, the court may direct the fact to be found accord-

ing to the evidence and may order an immediate amendment without costs," and further:

"SEC. 144. The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may permit the same to be made conformable thereto, by amendment."

Under this latter provision the Nebraska Supreme Court has ordered amendment to pleadings in cases appealed thereto.

In a suit for a statutory penalty at common law, if the necessary matters were stated in substance and effect it was sufficient, although the precise words of the statute were not used, 1 Chitty Pl. 372; Mitchell v. Clapp, 12 Cushing, 278.

The strict rules of common law pleading, however, do not apply.

Sec. 903 of the code provides that where the statute designates by name or otherwise the kind of action, as the one under consideration does, viz: "An action in the nature of an action of debt," but does not prescribe the mode of proceeding, and this does not, such action shall be commenced and prosecuted in conformity to the code.

The objections raised in plaintiff's brief in the first and fourth assignments of error are, however, fully met by the decision in the case of The First National Bank

of Charlotte, North Carolina v. Morgan, 132 U. S., 141. From the printed record in that case, on file in this court, we copy the entire petition:

North Carolina, Cleveland County:

Superior Court. Fall Term, 1882.

E. A. Morgan

vs.

The First National Bank of Charlotte, N. C.

Complaint.

The plaintiff complaining, alleges for first cause of action:

I. That the defendant is a corporation doing a general banking business at Charlotte, N. C., created by and under the laws of the United States of America and the State of North Carolina, and known and doing business under the name and style of The First National Bank of Charlotte, North Carolina.

That the said defendant, The First National Bank of Charlotte, North Carolina, after the 12th day of February, 1877, and before the commencement of this suit, to wit, on the 25th day of May, 1877, in the city of Charlotte, N. C., upon a certain corrupt contract made after the 12th day of February, 1877, as aforesaid to wit, on the 25th day of May, 1877, in the city of Charlotte, North Carolina, aforesaid, between the said defendant, The 1st National Bank of Charlotte, N. C. on the one part, and the plaintiff upon the other part, the said defendant took, accepted, and received of and from the plaintiff on said 25th day of May, 1877, a certain sum of money, to wit, the sum of $222.48 by way of corrupt bargain and loan, for the said defendant for bearing and

giving and having forborne and given day to the said plaintiff for the payment of a certain sum of money, to wit, the sum of $1,854, on the said 25th day of May, 1877, lent and advanced by the defendant to the plaintiff from the said 25th day of May, 1877 until the 25th day of May, 1878, which said sum of $222.46, so taken, accepted, and received by the defendant from plaintiff, in manner, and for the cause aforesaid, exceeds the rate of eight dollars for the forbearance of one hundred dollars for one year, contrary to the form of the statute in such cases made and provided, whereby, and by force of the said statute the said defendant owes the said plaintiff the sum of $454.96, that being double the amount of interest paid to defendant by the plaintiff on the amount of money loaned to plaintiff by defendant as aforesaid, for the space of one year as aforesaid and so foreborne as aforesaid, and thereby and by force of the said statute an action has accrued to plaintiff to demand and have for himself in this behalf and from the defendant the said sum of $444.98.

II. For second cause of action plaintiff, complaining, alleges—

That the said defendant, after the 12th day of February, 1877, and before the commencement of this action, to-wit, 25th day of May, 1878, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., upon certain corrupt and usurious contracts, made after the 12th day of February, 1877, as aforesaid, to wit, on the 25th day of May, 1878, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., aforesaid, between the said defendant, on the one part, and the plaintiff, on the other part, took, accepted, and received of and from the plaintiff certain sums of money, amounting in all to the sum of $793.92, by way of corrupt bargain and loan, for the said defendant, forbearing and giving and having forborne and given day to the plaintiff for the payment of a certain sum of money, to wit, the sum of sixteen hundred and fifty-four dollars,

theretofore, to wit, on the 25th day of May, 1878, and at subsequent times and dates thereto, in the city of Charlotte, N. C., aforesaid, lent and advanced by the said defendant to the said plaintiff, said amount being lent and advanced by the defendant to the plaintiff for sixty days at a time, the whole time from the said 25th day of May, 1878, until the 13th day of June, 1882, the time named, was loaned plaintiff by defendant, being four years and eighteen days, which said sum of $793.92 so taken and accepted and received by the defendant of and from the plaintiff in the manner and for the cause stated as aforesaid exceeds the rate of $8 for the forbearance of $100 for one year, contrary to the form of the statute in such cases made and provided, whereby and by force of the said statute the said defendant forfeited and owes to plaintiff for said offense the sum of $1,587.84, that being double the amount of interest by plaintiff to defendant for the loan and forbearance of the sum of $1,654 from the 25th day of May, 1878, until the 13th day of June, 1882, and thereby and by force of the said statute an action hath accrued to the plaintiff against the defendant for the sum of $1,587.84, for which amount plaintiff sues.

III. For a third cause of action plaintiff complains and alleges that the defendant, after the 12th day of February, 1877, and before the commencement of this action, to wit, on the 25th day of May, 1877, in the city of Charlotte, N. C., upon a certain corrupt and usurious contract made after the 12th day of February, 1877, aforesaid, to wit, on the 25th day of May, 1877, in the city of Charlotte, N. C., aforesaid, between the defendant, on the one part, and the plaintiff, on the other part, took, accepted, and received of and from the plaintiff a certain sum of money, to wit, the sum of $60, by way of corrupt bargain and loan, for the said defendant forbearing and giving day and and having forborne and given day to the plaintiff for the payment of a certain sum of money, to wit, the sum of $1,000, on the said 25th day of May, 1877, until the 25th day of De-

cember, 1877, which, said sum of $60 so taken, accepted, and received by the defendant from the plaintiff in manner and for the causes aforesaid, exceeds the rate of $8 for one year, contrary to the statute in such cases made and provided, whereby and by force of the said statute the said defendant forfeited for said offense and owes to the plaintiff the sum of $120, that being double the amount of interest paid to defendant by plaintiff for the forbearance and loan of the $1,000 for the time as above alleged, and thereby and by force of the statute for usury an action hath accrued to plaintiff against the defendant for the sum of $120, which amount plaintiff claims and sues for.

IV. For fourth cause of action plaintiff, complaining, alleges that the said defendant, after the 12th day of February, 1877, and before the commencement of this action, to wit, on the 25th day of March, 1877, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., upon certain corrupt and usurious agreements and contracts made after the 12th day of February, 1877, as aforesaid, to wit, on the 25th day March, 1878, — at other times and dates subsequent thereto, in the city of Charlotte, N. C., aforesaid, between the defendant, on the one part, and the plaintiff on the other part, took, accepted, and received from the plaintiff certain sums of money at various times, amounting in all to the sum of $377.98, by way of corrupt and usurious bargain and loan, for the said defendant forbearing and giving day to the plaintiff for the payment of $759 theretofore, to wit, on the 25th day of December, 1877, and at subsequent times and dates thereto, in the city of Charlotte, N. C., aforesaid, lent, and advanced to the plaintiff by the defendant, said amount being lent and advanced to the plaintiff by the defendant for sixty days at a time, the whole time from the 25th day of December, 1877, until the 19th day of June, 1882, when plaintiff quit paying usurious interest, being four years five months and twenty-four days, which said sum of $377.98, so taken, accepted, and received by the defendant of and

from the plaintiff, in the manner and for the cause stated as aforesaid, exceeds the rate of $8 for the forbearance of $100 for one year, contrary to the statute in such cases made and provided, whereby the defendant forfeited and owes to the plaintiff for said offense the sum of $755.96, that being double the amount of interest paid by the plaintiff to the defendant for the loan and forbearance of the sum of $759.00 from the 25th day of December, 1877, until the 19th day of June, 1882, and thereby and by force of the said statute an action hath accrued to plaintiff against the defendant for the sum — $755.96, for which amount plaintiff sues.

V. That the plaintiff, in addition to the usurious interest heretofore mentioned, has paid before the commencement of this action all the notes hereinbefore referred to and mentioned, except one note for $759.00 executed, and delivered to the defendant by plaintiff on the 19th day of April, 1882.

VI. That each and every one of the notes constituting the contract hereinbefore set forth were made payable on their face to one M. C. Roberts by plaintiff, and by said M. C. Roberts endorsed.

VII. That said notes so endorsed were received by the defendant as the contracts hereinbefore referred to.

VIII. That the manner of executing said contracts and said endorsements by said M. C. Roberts was in the knowledge and at the request of the defendant.

IX. That said M. C. Roberts received no benefit from said contracts and was only liable thereon as endorser, and bore none of the burdens of same and has no interest in this action.

X. That as to each cause of action hereinbefore set forth subsequent to the first the plaintiff hereby adopts, without repeating the same, the first allegation of the first cause of action. Wherefore the plaintiff demands judgment against the defendant for the sum of $3,000, with interest thereon until paid, and the costs of this action, and other and further relief.

And from the printed brief, on file in this court, of the plaintiff in error in that case it appears in the third assignment (page 7 of said brief) of errors that the same points raised by plaintiff in its first, second, and fourth assignments of error herein were raised, and by the court overruled. The assigament was:

The complaint does not allege what is the legal interest fixed by the laws of the State, nor does it negative that there are State banks of issue, which by law are allowed a greater rate of interest than is allowed by the general law of the State.

In the last paragraph of the opinion in that case, Mr. Justice Harlan, speaking for the court, says:

The objection that the complaint does not state facts sufficient to constitute a cause of action, under the act of Congress, is not well taken. It might have been more specific, but enough was alleged to justify the court in overruling the motion in arrest of judgment. The bank filed its answer, and went to trial upon the merits; and as the verdict embraces only illegal interest taken within the two years next preceding the commencement of the action, there is no ground to contend that the judgment exceeded the amount that Congress authorized to be recovered.

Judgment affirmed.

The supreme court in its discision in that case say:

The appellant's counsel further, in support of his motion in arrest of judgment, urges that the complaint is fatally defective in failing to "negative that there are State banks of issue which by law are allowed a greater rate of interest than is allowed by the general law of the State."

It is to be observed that the complaint avers a taking of interest for a forbearance of a loan of money greater that at the

rate of 8 per centum per annum, and the court judicially takes notice of the fact that this is the maximum allowed by contract under the general law of the State, and that no banking institution incorporated by the State can legally take more.

Why was it necessary to make the averment that the highest legal rate allowed by law was that mentioned, or that no more could be demanded and taken by a State bank?

Each would have been a public law, and when the facts are stated which show its violation and the incurring the penal liability therefor this must be sufficient as a statement of a cause of action against the wrong-doer. It is not necessary, certainly, to say there is no law under which, if there was, the defendant can find shelter for its acts, when the court knows there is none.

It is not like the case of a statute, which is itself qualified by an exception resting upon facts, which facts must be negatived to bring the case under the operation of the law, as the court has had several times occasion to remark, in considering public criminal accusations, in arriving at its true meaning. Here the facts are set out which show that the law has been violated, and this being known to the court, relief will be granted and the wrong redressed.

Upon a full examination of the exceptions in the light of the able argument of counsel in support, we find and so declare that there is no error of which the appellant can complain, and the judgment must be affirmed. It is so ordered.

In Barnet v. Muncie National Bank, of Muncie, Indiana, 98 U. S., 855, Mr. Justice Swayne, speaking for the court, and of that case, commenced in one of the State courts of Ohio, said: "The procedure in this case after it reached the circuit court, as well as before, was governed by the Ohio code of practice" citing R. R. Co.

v. Horst, 93 U. S., 291:

That the statute under consideration is not strictly penal, but in its provisious remedial, will appear when the construction given it by the courts is considered. In Monongahelia National Bank vs. Overholt, 96 Pa. St., 329, the court says, "that the sum so recovered is so penal in character that it is commonly called a penalty; but is not the act in strictness more remedial than penal? Taking interest beyond the prescribed rates is not a criminal offense; does not forfeit the debt or give a qui tam action to an informer, is not denounced by pains and penalties as was usury by the common law of ancient statutes; nor is the right to the person who paid the excessive interest, for it may pass to his legal representatives, and in this respect it is not treated as a penalty or tort to the person. He may recover back twice the amount so paid by an action in the nature of an action of debt. And in Bank vs. Dearing, 91 U. S., 29, the court says " that the 30th section, " referring to this act under consideration, " is remedial as well as penal and is to be liberally construed to effect the object which Congress had in view in enacting it, " citing Gray vs. Bennet, 3 Met. 522-529.

In Lebanon National Bank vs. Karmony, 98 Pa. St., 65, it was held that Sec. 5198 U. S. Rev. Stat. is purely remedial.

And to the same effect see Huntington v. Attrill, 146 U. S., 657-689.

The third error assigned in plaintiff's brief is: "That the supposed causes of action are alleged to have accrued to the plaintiff below by force of section 5198 of the Revised Statutes United States, whereas the same accrued, if at all, under and by force of sections 5197 and 5198 of the Revised Statutes, and not by force alone

of section 5198, as alleged.

In plaintiff's printed brief, at page 13, counsel considers his third and fourth assignment of errors together, and while admitting that the former strict form of pleading has been abolished and the substance only retained, he proceeds to complain of the form only.

The allegation: "That said payment of interest so as aforesaid paid by plaintiff to defendant and by defendant knowingly contracted for and received was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent per annum, and was in violation of section 5198 of the Revised Statutes of the United States, corrupt and usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statutes of the United States the defendant became and is indebted to the plaintiff in the sum &c.," is certainly sufficient. If the words "in violation of section 5198" had been omitted, or are treated as surplussage the words "corrupt and usurious" are sufficient, or the words "in violation of the statutes of the United States" are also sufficient.

This action was brought under and by virtue of the remedy secured in section 5198, and not in section 5197. The acts and facts charged in the petition brings the case within the conditions condemned in section 5197, but there is no requirement that more than the facts

shall be pleaded. There was no necessity for a reference to the section where such acts are condemned, nor, for that matter, to section 5198, which gives the remedy. Section 5197 provides what rate may be charged but does not declare the penalty, nor provide the remedy, that is left for section 5198, and there it is found.

Again, section 5198 itself refers to section 5197, in the following words: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done etc.," so that the reference in the petition to section 5198, directs attention to the restrictions contained in section 5197, both of which formerly were contained in section 30 of the act of June 30, 1864.

The averment, in the complaint attacked, that the interest charged, contracted for, paid and received "was at a greater rate of interest than is allowed by the laws of the state of Nebraska, is a comprehensive allegation, following as near as may be the language of the statute, and positively negatives the exception contained in section 5,197, and embraces every limit fixed, or which could be determined by legislation on the subject of limiting the rate of interest in the state of Nebraska, either directly, or, in provisions excepting persons or corporations, seems to be "one of those plain propositions which reason can not render plainer."

But, if to maintain the suit, it were necessary that the

pleading, having referred to section 5198, should also refer to section 5197, then are we not without that prop, for in the answer to said complaint, the plaintiff in error supplies the defect, if defect it be, by pleading the exact language in question, and says (Rec., 21), "as provided by sections 5197 and 5198 of the Resvised Statutes of the United States, UNDER WHICH SAID CAUSES OF ACTION ARE BROUGHT."

In Haggard v. Wallen, 6 Neb., 272, it was held: "In cases where the petition is defective for want of a material averment, and such averment is supplied by the answer and is not inconsistent with the averments in the petition, the defects in the petition will thereby be cured, at least after verdict and judgment thereon," citing Erwin v. Shaffer, 9 Ohio State, 44; Insurance Co. v. Kelly, 24 Ohio State, 365.

The fifth error assigned in plaintiff's brief is: "There is no allegation in either of the counts or causes of action to the petition that the indebtedness of the plaintiff below to the bank, as therein specified, has been paid; and, for aught alleged, the several transactions complained of are still in fieri."

As hereinbefore shown the exact opposite of the statement made is true, but in Lebanon National Bank v. Karmony, 98 Pa. St., 65, it is said: "If illegal interest be contracted for the debt shall bear no interest. If such

interest be paid the offending bank is liable in an action for twice the amount. THAT LIABILITY IS INCURRED THE MOMENT THE BANK TAKES THE ILLEGAL INTEREST."

In Monongahela National Bank v. Overholt, 96 Pa. St., 327, it was held that suit for the penalty could be maintained whether the debt had been paid or not, and it had not in that case.

Turning to the cases cited by plaintiff in error in its counsel's brief, we find that in Farmers' and Mechanics' Bank v. Dearing, 91 U. S., 29, the principal question decided is that the penalty prescribed in the Federal act, and not the penalties prescribed by State legislation in the State where the national bank is situated, governs. The court in that case, speaking by Mr. Justice Swayne, held that "It must always be borne in mind that the constitution of the United States, and 'the laws which shall be made in pursuance thereof, are the supreme law of the land' (Const., art. 6), and that this law is as much a part of the law of each State, and as binding upon its authorities and people as its own local constitution and laws. * * * The 30th section (5197 and 5198) is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it," citing Gray v. Bennett, 3 Met., 522, 529.

It follows, and is certainly true, that it was no more necessary to plead in the State court of Nebraska the provisions of the law of the United States than to plead

the law of Nebraska, both of which are taken judicial notice of in such court. Yet, in plaintiff's brief counsel insists that a cause of action is not stated because section 5197 of the Revised Statutes of the United States was not referred to, and because defendant in error did not state "the rate of interest allowed in any case by the laws of the State of Nebraska," so that a court of Nebraska might be informed in the pleadings of what the law of Nebraska is. Certainly a novel purpose of pleading.

The cases cited in the brief of the plaintiff in error, although for the most part decided before the adoption of the more liberal rules of pleading provided under the code system, do not sustain the contention of counsel.

The case of Soper v. Hingham and Quincy Bridge and Turnpike Company, 4 Pick., 341, was a case where the plaintiff did not show in his declaration that he was a person belonging to the class of persons who were given a right of action by the statute under consideration, one "from whom toll is demandable," and the court held: "No person except one from whom toll is demandable, can sustain an action on that statute for an injury so sustained."

"The declaration in such an action should state that the plaintiff is a person from whom toll is demandable; and the want of such an averment, OR OF ALLEGATIONS

FROM WHICH THAT MAY BE INFERRED, is not cured by verdict."

Of the case, to which plaintiff's brief refers, cited by the court in that decision, the opinion says:

> The cases before cited sufficiently establish the rule, that where an action is given by statute, and in another section, or subsequent statute, exceptions are enacted, the plaintiff need not take notice of these exceptions in his count, but leave it to the defendant to set them up in his defense. But where the exception or limitation is contained in the same section which gives the right of action, the plaintiff must negative the application of them to his ground of action. Here unfortunately the qualification of the right of action is contained in the very section which gives the right.

In the case at bar, the exception, as the court will observe, is not contained in section 5198, the one giving the right of action, but in section 5197.

The case of Wayman, et al., v. Southard, et al., cited by plaintiff in error, was where the subject matter involved was the construction of a provision contained in the judiciary act of 1789, C. 20, relative to the issuing of writs by Federal courts, but it was distinctly held that the proviso under consideration was no exception to the enacting clause, which related to the subject under consideration, and has no application whatever to the question here under consideration.

In the case of Spiers v. Parker, where the exceptions in the act specified a number of ships, or different kinds of ships, and deserters from any such ships" might be

lawfully impressed into the service.

The exceptions in the act of Parliament specified a number of ships, or different kinds of ships, and deserters from "any such ship" might be lawfully impressed into the service. The defendant below was the captain in command of the warship Diamond. The declaration undertook to negative the exceptions by alleging that the mariner was not a deserter from the "war-ship called the Diamond." But the court held that the words, "any such ship," must be taken in connection with what went before, and when so taken meant "ships," such as specified in the exceptions, and that the declaration was fatally defective in that it failed to negative all the exceptions by alleging the mariner was not a deserter from any of his Majesty's ships.

Applying the principle to the averment under consideration, "was at a greater rate of interest than is allowed by the laws of Nebraska" do we not in effect say that from which it must be inferred that it was "at a greater rate than is allowed" by any of the laws of Nebraska including any possible exceptions?

The case of Soper v. The President, &c., of Harvard College, 1 Pick., 177, is a case where the action was brought upon statute 1819, c. 37, the first section of which provided that no livery-stable keeper "shall give credit to any under graduate of either of the colleges within this commonwealth without the consent of such officer or officers of the said colleges, respectively, as may be authorized to act in such cases by the government of the same, or in violation of such rules and regulations as shall

be from time to time established by the authority of said colleges, respectively." The 3d section gives an action on the case against the person giving credit to recover a sum equal to the amount which shall be so unlawfully credited. The court held:

> But, for errors manifest in this record, the judgment of the Circuit Court of Common Pleas must be reversed. It is not alleged in the declaration, that any rules have been established on the subject of the statute, nor that any officer has been authorized by the government of the college to give the consent which may be an excuse for the act of giving credit, though it is averred, that the credit was given without such consent. But we think the penalty is not incurred, unless some rules have been made on the subject of giving credit, nor unless some officer has been authorized to give or withhold consent, as the circumstances may require. The giving credit generally is not an offense, but only when it shall be done in violation of rules established by the government of the college. It is an essential fact, which ought to be averred, that such rules have been made.

Of course the State courts could not take judicial notice of whether the colleges had made rules, and what rules, if any. But in in the case at bar, the Nebraska court was bound to take judicial notice of what the laws of Nebraska are upon the limitation of interest rates generally, or specially, if any exception in favor of banks of issue existed, as said in the North Carolina case above cited. And therein is the great difference between the Massachusetts case and this case, to say nothing about the more liberal rules of pleading which existed when nearly

all of the cases relied on by plaintiff in error were decided.

The case of Downe v. Simpson, 2 Mass., 444, cited by plaintiff, was where in a prosecution for bastardy, the appellate court considered the evidence in the case and in the opinion discussed the evidence as a basis of their decision, as also whether the proceedings in the case were removed by the proper writ, and finally quashed the proceedings for that reason, and the case was not decided upon the question of the insufficiency of the complaint, and the observation in this case, as in others cited by counsel, was a casual remark upon general rules and not the principle decided in the case.

Bigelow v. Johnson, 13 Johns., 428, was where the complaint set out a violation of one of the offenses contained in a section of the excise law, and upon the trial it appeared that he was, if at all, guilty of another offense named in the same section but not specified in the complaint. The judgment below was, therefore, reversed.

The case of Bartlett v. Crozier, 17 Johns., 440, another case cited by plaintiff in error, was where the action was brought against the overseer of highways for neglect to repair a bridge, and it was held that no right of action existed in favor of a citizen against an overseer or against the commissioners of highways, but if against either, the commissioners of highways. And if the

overseer defending were liable for neglect of duty, it was not shown that it was his duty to repair the bridge.

In Sheldon v. Clark, 1 Johns., 513, cited by plaintiff in error, the decision is flatly against the rule contended for in its brief, and it was held: "In an action against a person for practicing physic against the act, it is incumbent on the defendant to show himself within some of the provisions, and the plaintiff is not bound to negative the provisos in his declaration."

Barrett v. Muncie National Bank of Muncie, 98 U. S., 555, simply decided that the penalty provided by law can not be recouped or counter-claimed in an action brought upon the promissory note or bill of exchange upon which illegal interest was charged or taken.

In the brief of the plaintiff in error, at page 17, counsel contends that "None of the considerations herein presented to the court against the sufficiency of the complaint or petition of the plaintiff below, were called to the attention of the Supreme Court of Nebraska." In answer to this we direct attention to page 33 of the record, where plaintiff in error, upon the trial of the cause, objected to the introduction of any evidence under the petition on the ground that it does not state facts sufficient to constitute a cause of action. This objection was overruled and plaintiff duly excepted.

The sixteenth assignment in plaintiff's petition in er-

ror in the Supreme Court of Nebraska, is for "errors of law occuring at the trial and duly excepted to."

This, under the law and decisions in Nebraska, is a sufficient assignment to raise the question of the sufficiency of the petition, and did raise it, and the decision of that court, in law, covers the point, and is a construction of the law of pleading in that behalf in Nebraska, by the Supreme Court of that state.

The decision in the case of the First National Bank of Charlotte v. Morgan, above cited, was cited and urged in the Supreme Court of Nebraska in one of these cases, that of The Schuyler National Bank v. Hector C. Bollong, and the complaint was quoted in full in the brief there, as it is here. And plaintiff was not in ignorance of that decision when he brought error in that case to this court. And that the writ of error herein was sued out merely for delay, will appear, when we consider the attitude of the plaintiff in his brief, where it fully appears, as therein stated, (page 17) that "none of the considerations herein [therein] presented to the court, against the sufficiency of the complaint or petition of the [defendant] plaintiff below, were called to the attention of the Supreme Court of Nebraska." And the further fact that none of the numerous alleged errors which were urged in the Supreme Court of Nebraska are called to the attention of this